Applicant Details

First Name	**Holly**
Last Name	**Boux**
Citizenship Status	**U. S. Citizen**
Email Address	**hboux@jd21.law.harvard.edu**
Address	**Address** Street **772 Race St.** City **Denver** State/Territory **Colorado** Zip **80206** Country **United States**
Contact Phone Number	**202-285-3555**

Applicant Education

BA/BS From	**Queen's University, Canada**
Date of BA/BS	**June 2007**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 27, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Harvard Journal of Law & Gender**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**Colorado**

Prior Judicial Experience

Judicial Internships/Externships	**Yes**

Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Saris, Patti
Honorable_Patti_Saris@mad.uscourts.gov
Stein, Michael
mastein@law.harvard.edu
617-495-1726
Wolohojian, Gabrielle
gabrielle.wolohojian@jud.state.ma.us
(617) 626-7918
Rosenfeld, Diane
rosenfeld@law.harvard.edu
617-496-6228

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Holly Jeanine Boux
hboux@jd21.law.harvard.edu • 202.285.3555 • 772 Race St., Denver, CO 80206

April 30, 2022

The Honorable Jane L. Kelly
United States Court of Appeals for the Eighth Circuit
United States Courthouse
111 Seventh Avenue, SE
Cedar Rapids, IA 52401-2101

Dear Judge Kelly:

I am writing to apply for a clerkship in your chambers for the 2023–2024 term. I graduated *cum laude* from Harvard Law School in 2021, where I was a member of the Harvard Law School Board of Student Advisers, and an Articles Editor for the *Harvard Journal of Law & Gender*. I am currently a litigation associate at Arnold & Porter, and in August 2022 I will begin a one-year clerkship with The Honorable Tena Campbell of the U.S. District Court for the District of Utah.

Before law school I taught political science at Colorado State University for six years, where my work involved extensive research and writing about legal and political questions. At Harvard Law School, I gained additional research and writing experience as a teaching assistant for legal research and writing classes, a research assistant for two professors, and an intern for two judges.

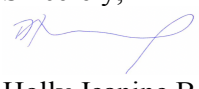
I am interested in an appellate clerkship because of the exceptional opportunity it would give me to develop my legal research and writing skills. But I am particularly interested in working for you. As not only the sole Democratic appointee on the Eighth Circuit, but also the only woman currently on that court, you occupy a unique, and uniquely challenging, position in our federal courts. I would be grateful for the opportunity to learn from you, and to work in such a challenging and profoundly important environment.

Enclosed please find my resume, law school transcript, and two writing samples—one written without any external feedback, and the other a forthcoming publication in the *Berkeley Journal of Gender, Law & Justice*. I am happy to provide any other information that would be helpful. Judge Saris, Justice Wolohojian, and Professors Stein and Rosenfeld are submitting letters of recommendation on my behalf, and they welcome inquiries:

- The Honorable Patti B. Saris of the United States District Court for the District of Massachusetts, Honorable_Patti_Saris@mad.uscourts.gov, 617.998.1045
- The Honorable Gabrielle Wolohojian of the Massachusetts Appeals Court, gabrielle.wolohojian@jud.state.ma.us, 617.725.8087
- Professor Michael Ashley Stein, Harvard Law School, mastein@law.harvard.edu, 617.495.1726
- Professor Diane L. Rosenfeld, Harvard Law School, rosenfeld@law.harvard.edu, 617.495.5257

Thank you for your time and consideration.

Sincerely,



Holly Jeanine Boux

Holly Jeanine Boux

hboux@jd21.law.harvard.edu • 202.285.3555 • 772 Race St., Denver, CO 80206

EDUCATION

Harvard Law School, Cambridge, MA 2018 – 2021
J.D., cum laude
Activities: Board of Student Advisers, Teaching Assistant for First-Year Legal Research and Writing course. *Harvard Journal of Law & Gender*, Online Editor, Executive Content Editor and Article Editor. Harvard Law School Project on Disability (Professor Michael Ashley Stein), Research Assistant. Harvard Law School Gender Violence Program (Professor Diane Rosenfeld), Research Assistant. Harvard Women's Law Association, Domestic Policy Committee.
Selected publication:
H. J. Boux & M. A. Stein, *Accessing Employment and Transportation: The Role of the New York City Mayor's Office for People with Disabilities*, 47 FORDHAM URB. L.J. 1257 (2020).

Georgetown University, Washington, DC 2007 – 2016
Ph.D. in American Government, Minor: Women and Politics
Honors: Five-year academic fellowship; Assistantship in Teaching Certificate (April 2015).

Queen's University, Kingston, Ontario, Canada 2002 – 2007
B.A. (Honours), with Distinction in Political Studies, Minor: Psychology

EXPERIENCE

Hon. Tena Campbell, U.S. District Court, District of Utah, Salt Lake City, UT August 2022 – August 2023
Law Clerk

Arnold & Porter, Denver, CO November 2021 – August 2022
Associate — Litigation

Hon. Indira Talwani, U.S. District Court, District of Massachusetts, Boston, MA July – September 2020
Legal Intern
Wrote multiple bench memos analyzing motions to dismiss about patent disputes over claim construction, infringement, the Lanham Act, and inventorship, and about several employment cases.

Arnold & Porter, Denver, CO (remote) June – July 2020
Summer Associate — Litigation
Drafted portion of motion to dismiss regarding corporate agency. Researched and wrote memoranda on veteran's benefit appeals, joint defense agreements, and COVID-19 era Sixth Amendment speedy trial issues.

Hon. Gabrielle R. Wolohojian, Massachusetts Appeals Court, Boston, MA Spring 2020
Legal Intern
Wrote bench memos, conducted legal research, and assisted in opinion drafting for cases heard by the Appeals Court. Participated in conferences with Justice Wolohojian and her clerk. Observed oral argument.

Massachusetts Attorney General's Office, Boston, MA Summer 2019
Legal Intern — Trial Division
Researched and drafted motion for summary judgment and motion to dismiss, and replied to discovery requests.

Colorado State University, Fort Collins, CO 2012 – 2018
Instructor — Political Science
Taught *American Government*, *Constitutional Law*, *Civil Rights & Liberties*, and *Women & Politics*. Oversaw graduate and undergraduate research. Won 2018 collegewide Excellence in Teaching Award.

Georgetown University Department of Government, Washington, DC 2007 – 2012
Instructor and Research/Teaching Assistant
Taught *American Government*. Conducted research for professors. Graded assignments and led discussion sections.

INTERESTS

Running, skiing, spin, fantasy football—league winner 2015, 2016, 2019, walking my English bulldog (slowly).

Harvard Law School

Date of Issue: May 27, 2021
Not valid unless signed and sealed
Page 1 / 2

Record of: Holly J Boux
Current Program Status: Graduated
Degree Received: Juris Doctor May 27, 2021 Cum Laude
Pro Bono Requirement Complete

JD Program

Fall 2018 Term: August 29 - December 20

1000	Civil Procedure 3 Charles, Guy-Uriel	P	4
1001	Contracts 3 Bar-Gill, Oren	P	4
1002	Criminal Law 3 Natapoff, Alexandra	P	4
1006	First Year Legal Research and Writing 3A Platt, Alexander	H	2
1005	Torts 3 Sargentich, Lewis	P	4

Fall 2018 Total Credits: 18

Winter 2019 Term: January 07 - January 25

1053	What Kind of Lawyer Do You Want to Be?: An Introduction to Legal Practice in Different Practice Settings Rakoff, Todd	CR	3

Winter 2019 Total Credits: 3

Spring 2019 Term: January 28 - May 17

2058	Disability Rights Law Stein, Michael Ashley * Dean's Scholar Prize	H*	2
1006	First Year Legal Research and Writing 3A Platt, Alexander	H	2
1003	Legislation and Regulation 3 Renan, Daphna	P	4
1004	Property 3 Benkler, Yochai	H	4
1008	Public International Law Blum, Gabriella	P	4

Spring 2019 Total Credits: 16
Total 2018-2019 Credits: 37

Fall 2019 Term: August 27 - December 18

2035	Constitutional Law: First Amendment Fried, Charles	H	4
2712	Disability, Human Rights, and Development Stein, Michael Ashley	H	2
2293	Drug Product Liability Litigation Grossi, Peter	H	3
2178	Legal Writing: Advanced Burling, Philip	CR	2
2226	Sex Equality MacKinnon, Catharine * Dean's Scholar Prize	H*	3

Fall 2019 Total Credits: 14

Winter 2020 Term: January 06 - January 24

7000W	Independent Writing Stein, Michael Ashley	H	2

Winter 2020 Total Credits: 2

Spring 2020 Term: January 27 - May 15

Due to the serious and unanticipated disruptions associated with the outbreak of the COVID19 health crisis, all spring 2020 HLS academic offerings were graded on a mandatory CR/F (Credit/Fail) basis.

2000	Administrative Law Vermeule, Adrian	CR	4
2036	Constitutional Law: Separation of Powers, Federalism, and Fourteenth Amendment Klarman, Michael	CR	4
8099	Independent Clinical - Judge Wolohojian Stein, Michael Ashley	CR	4

Spring 2020 Total Credits: 12
Total 2019-2020 Credits: 28

Fall 2020 Term: September 01 - December 31

2079	Evidence Murray, Peter	P	2
7000W	Independent Writing Stein, Michael Ashley	H	3
2169	Legal Profession Kaufman, Andrew	H	3
2242	Title IX: Sports, Sex and Equality on Campus Rosenfeld, Diane * Dean's Scholar Prize	H*	2

Fall 2020 Total Credits: 10

continued on next page

Assistant Dean and Registrar

Harvard Law School

Record of: Holly J Boux

Date of Issue: May 27, 2021
Not valid unless signed and sealed

Spring 2021 Term: January 25 - May 14

2068	Employment Discrimination Churchill, Steve	H	2
2861	Facts and Lies Saris, Patti * Dean's Scholar Prize	H*	2
2086	Federal Courts and the Federal System Goldsmith, Jack	H	5
2098	Gender Violence, Law and Social Justice Rosenfeld, Diane	H	3
2170	Legal Profession Seminar Wilkins, David * Dean's Scholar Prize	H*	2

Spring 2021 Total Credits:	14
Total 2020-2021 Credits:	24
Total JD Program Credits:	89

End of official record

HARVARD LAW SCHOOL OFFICE OF THE REGISTRAR VE RI TAS

Assistant Dean and Registrar

HARVARD LAW SCHOOL
Office of the Registrar
1585 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4612
www.law.harvard.edu
registrar@law.harvard.edu

Transcript questions should be referred to the Registrar.

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In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.

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A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems

Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program

Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)
Magna cum laude Next 10% of the total class following *summa* recipients
Cum laude Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates

LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

Assistant Dean and Registrar

January 25, 2022

The Honorable Jane Kelly
United States Courthouse
111 Seventh Avenue, SE
Cedar Rapids, IA 52401-2101

Dear Judge Kelly:

I highly recommend Holly Boux for a clerkship on the Court of Appeals. Holly is an outstanding writer and made extremely insightful comments in class. She received the highest grade in my class and received multiple “dean’s list” grades at Harvard Law School.

Ms. Boux was a student in my seminar, Facts and Lies, last spring at Harvard Law School. We met twelve times in a small group, and Holly also spoke with me several times during office hours. The course focused primarily on the role of the trial court in finding facts, the tools used to assess credibility, problems with memory and implicit bias, and the doctrines which punish lying. We also addressed appellate review of agency factfinding and the standards of appellate review of factual questions, in particular involving constitutional rights and mixed questions of fact and law. We talked about the role of the “managerial” trial judge.

I required extensive writing. Each student drafted a memorandum in support of a motion to dismiss, in opposition, and a memorandum on a summary judgment motion. Students also submitted response papers to the readings.

Holly’s written product was consistently outstanding. Her final memorandum and order was one of the best in the class. She drafted an opinion on a motion for summary judgment in a civil rights action involving the qualified immunity doctrine. Her factual narrative and legal analysis were excellent; she used the factual record well. Her response papers analyzing the legal analysis were thorough and insightful.

I have no reservations about recommending Holly. Please call if there are any questions.

Very truly yours,

Patti B. Saris
U.S. District Judge

Patti Saris - Honorable_Patti_Saris@mad.uscourts.gov

HARVARD LAW SCHOOL

CAMBRIDGE · MASSACHUSETTS · 02138

PROFESSOR MICHAEL STEIN
Executive Director,
Harvard Law School Project on Disability

Austin Hall 305
1585 Massachusetts Avenue
(617)495-1726; mastein@law.harvard.edu

January 25, 2022

The Honorable Jane L. Kelly
United States Court of Appeals, Eighth Circuit
United States Courthouse
111 Seventh Avenue, SE
Cedar Rapids, IA 52401-2101

Dear Judge Kelly:

I write to give very strong support to the clerkship application of Dr. Holly Boux (HLS 2021). In brief, Holly is an exceptionally talented legal researcher and writer, has a great work ethic and desire to learn, and is a genuinely good and well-grounded person (and an adult). She will make a great judicial clerk and reflect well on your chambers.

I know Holly well and can speak to her qualities with confidence. Holly received Honors Pass grades in each of the two courses she took with me the past two years, Disability Rights Law (Spring 2019) and Disability, Human Rights, and Development (Fall 2019). Both classes required independent research papers and Holly sparkled. Indeed, she proved so adroit that I invited her to attend a symposium at Fordham Law with me (having them pay her travel expenses rather than mine)—and since then she has had two other, solo articles, accepted for publication. I also supervised Holly's clinical placement with Justice Wollohojian, and have interacted with her at several Harvard Law School Project on Disability advocacy events and remained in touch since graduation.

Holly is a very bright, dedicated, hardworking, and responsible person who is intellectually curious as to practically anything related to our legal system, and enjoys researching problems and reflecting on approaches to solving them. She is also extremely pleasant and collegial and would make a positive addition to any chamber. I feel very strongly regarding her capabilities, and am very confident that she'll do a terrific job. I note that in graduating HLS *cum laude*, Holly received Honors passes from academics as politically divergent as Jack Goldsmith and Kitty MacKinnon, indicating that she has a flexible mind and can adapt to different circumstances.

Holly will clerk for the Hon. Tena Campbell next year (after litigating for a year with Arnold & Porter), and so is seeking a clerkship for the 2023-24 term.

Please feel free to contact me if I can provide any additional information.

Sincerely yours,

Michael Stein

January 23, 2022

The Honorable Jane Kelly
United States Courthouse
111 Seventh Avenue, SE
Cedar Rapids, IA 52401-2101

Dear Judge Kelly:

It gives me tremendous pleasure to write this letter of recommendation on behalf of Holly Boux, who was a legal intern in my chambers this term. I do not normally hire interns, but I made an exception in Holly's case because she came highly recommended by one of my best former law clerks. Hiring Holly turned out to be a very good decision indeed.

Holly worked in my chambers for approximately four months. Her internship began before the coronavirus outbreak and so she initially came into chambers to work three days a week. Thereafter, we moved to working remotely, but Holly continued to participate in our activities daily. I got an excellent chance to assess Holly's intelligence, diligence, work habits, and personality while she worked for me. It is my practice to challenge my law clerks and interns to make the leap required to go from law school to practicing law, which I try to do by working with them directly on all aspects of the cases pending before me. This includes discussing with them the parties' arguments and the record, fully engaging with them in their research as it progresses, and subjecting their writing to extensive revision and criticism. I also assign as broad a range of issues as possible in order to broaden their experience and knowledge. I mention all this only to give you a sense of the bases upon which I highly recommend that you hire Holly as a law clerk.

During her internship, Holly worked on a legal malpractice case involving a novel question of law; namely, when does the statute of limitations accrue on a malpractice claim against a lawyer who failed to discover her predecessor's malpractice. Holly researched various legal questions presented by the case, and drafted sections of a possible opinion. Holly also worked on an appeal from the denial of a motion for new trial in a criminal domestic violence case. She researched the issues, and wrote a draft decision. Holly also worked on a criminal sexual assault case that questioned the admission of prior convictions and whether the convictions were duplicative. Holly wrote a bench memo analyzing these issues and also drafted a decision. Finally, Holly researched the Eighth Amendment's application to prison conditions as a result of COVID-19 infection in them.

Holly's work on all of these assignments was excellent. She has a quick mind, and is able to grasp legal arguments and their nuances with agility. Her writing clearly expresses her analysis, and it is well organized. She is able to identify questions with which she needs help or guidance, and yet also knows enough to try to find the answer for herself first. She is a hard worker, and is always timely with her work. I found her to be extremely careful with the record, and I could count on her knowledge of it. She has the skills and abilities to be a fine lawyer, and a terrific law clerk. I highly recommend her.

On a more personal note, I will add that Holly was a joy to have in chambers. She is personable and easygoing. She is able to work independently while also being a member of the team. I was worried that Holly would go adrift once we transitioned to remote working; that worry could not have been more misplaced.

If you would find it useful to speak with me further about Holly, please do not hesitate to call me at 617-686-1922.

Sincerely,

/s/ Gabrielle Wolohojian

Gabrielle R. Wolohojian

Gabrielle Wolohojian - gabrielle.wolohojian@jud.state.ma.us - (617) 626-7918

Holly Jeanine Boux
hboux@jd21.law.harvard.edu • 202.285.3555 • 772 Race St., Denver, CO 80206

WRITING SAMPLE

The attached paper is a memorandum of law in support of a motion for summary judgment. It was written to satisfy the requirements of the "Facts & Lies" class at Harvard Law School, which was taught by Hon. Patti B. Saris, Judge, U. S. District Court, District of Massachusetts. The attached version is entirely my own work, and was written without receiving any oral or written feedback from anyone.

The assignment is based around *Gray v. Cummings*, a civil rights action alleging the use of excessive force by a police officer. Herein, Ms. Judith Gray is suing Athol police officer Thomas Cummings under 42 U.S.C. § 1983 for violating her Fourth Amendment rights by using excessive force during an arrest. She is also suing the Town of Athol for failure to train.

Using a closed universe of cases, this motion argues that (i) Officer Cummings did not violate the Fourth Amendment in arresting Ms. Gray, but, even if he did, (ii) Ms. Gray's Fourth Amendment right was not clearly established at the time of the arrest. It also address municipal liability.

Holly Jeanine Boux
Facts & Lies Mem. Supp. Mot. Summ. J.

I. Introduction.

Plaintiff Judith Gray brought this action pursuant to 42 U.S.C. § 1983, alleging Officer Thomas Cummings ("Officer Cummings") used excessive force while stopping her, and Town of Athol ("Athol," jointly "Defendants") failed to train its officers. Under Federal Rule of Civil Procedure 56, Defendants move for summary judgment on Counts I and II of the Complaint. Such a grant is appropriate; a proper amount of force was used to allow the belligerent, resistant Plaintiff to be safely seized and returned to the hospital. Even if it was excessive force, qualified immunity applies as the right at issue was not "clearly established." Plaintiff's lack of evidence of similar violations also warrants judgment as a matter of law on the failure to train claim.

II. Factual Background.

These facts are undisputed except where stated: Officer Cummings met Plaintiff when he was dispatched to find her after she, a Section 12 patient, left the hospital, which called police seeking her return. Facts, ¶¶ 4, 7.[1] He found her walking shoeless, roadside. Id. ¶ 5. Immediately, she yelled "Fuck you!" and "I'm not fucking going back!" at him. Id. ¶¶ 10, 12. She first kept walking but stopped to face him from five feet away, clenched her fists, teeth, and body, yelled "Fuck you!" and walked at him. Id. ¶¶ 15, 20–23. Her version of the encounter is: he reacted by putting out his arm to grab her shirt; as she kept pushing, he took her to the ground for control; she put her arms under her chest, refusing orders to put her hands behind her; he "drive stun" tased her once, handcuffed her, and used no more force. Pl.'s Resp., ¶¶ 24A, 26A, 26–28, 36, 42.

Count I alleges Officer Cummings used excessive force during the arrest. Count II alleges Athol's failure to train its officers caused the violation. To support the latter, Plaintiff offers no evidence of similar violations. She offers evidence that in the 18 months before the arrest Officer

[1] "Facts, ¶ _" refers to the enumerated paragraphs of Defendants' Statement of Material Facts filed herewith.

Cummings was trained in Taser use and dealing with mentally ill persons, see Facts, ¶¶ 51, 55–57, 59, and allegations and an expert's critique of Defendants' acts and training; notes substitutes "may or may not have worked," see Lyman Dep. 23:15–16; see, e.g., id. 119:25–120: 1–2 (arguing deescalation training violation); id. 120:20–23 (noting policy; "pain compliance may not be effective against someone in a state of mind/body disconnect"); Pl.'s Resp., ¶ 9B–C ("Prior to getting out of his vehicle a trained, reasonable officer would have [e.g.,] called for another officer to subdue Judith using 'soft-handed techniques.'"), id. ¶¶ 13B, 31A ("[tasing] inconsistent with" standards); Lyman Dep. Ex. A, 12–13 (noting Taser use policy about "[t]hose known to be suffering from severe mental illness"; and officer "inferr[ed]" "likely" mental state).

III. Legal Standard For Rule 56 Motion For Summary Judgment.

Summary judgment is appropriate when there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute exists where evidence would permit a rational factfinder to resolve the issue for either party, when reasonable inferences are drawn, and disputed facts viewed, in the nonmovant's favor. Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990). A movant must identify the parts of the record showing the absence of a genuine issue of material fact; it can offer evidence disproving an element, or point to an absence of evidence in support, of the nonmovant's case. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 325 (1986). A nonmovant must then present affirmative evidence, via facts, showing there is a trial-worthy issue; it cannot rest on allegations or pleading denials. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

IV. Argument.

Summary judgment is appropriate. Officer Cummings is entitled to qualified immunity, and there is no genuine dispute as to any material fact about Athol's liability for failure to train.

A. Officer Cummings Is Entitled To Qualified Immunity.

"[Q]ualified immunity shields officials from civil liability so long as their conduct 'does not violate clearly established . . . rights of which a reasonable person would have known.'" Mullenix v. Luna, 136 S. Ct. 305 (2015) (per curiam) (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009)). Courts ask whether Plaintiff's alleged or shown facts make out a constitutional violation, and whether the right was "clearly established" when allegedly violated, Ciolino v. Gikas, 861 F.3d 296, *10 (1st Cir. 2017), and can begin with either issue. Estate of Armstrong v. Village of Pinehurst, 810 F.3d 892, *43, 45–46 (4th Cir. 2016) (Wilkinson, J., concurring) (citing Pearson, 555 U.S. 223 at 242) (arguing use of force issue should not be unnecessarily decided).

i. The Right At Issue Was Not Clearly Established At The Time Of The Conduct.

Plaintiff has not established that the constitutional right at issue was clearly established at the time of her encounter with Officer Cummings. Thus, summary judgment is appropriate.

To show a "clearly established" right, plaintiffs must *inter alia* establish that in the case's *particular factual context*, a reasonable officer would have understood his conduct violated the right at issue. Mlodzinski v. Lewis, 648 F.3d 24, 32–33 (1st Cir. 2011). Looking to sister circuits to assess "clearly established" is accepted. McCue v. City of Bangor, Me., 838 F.3d 55, 64 (1st Cir. 2016). This a high bar; a case directly on point is not required, but case law must put the "question beyond debate," Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011), so "every reasonable official would have understood" what he did violates the right, Mullenix, 136 S. Ct. at *10.

In Morelli v. Webster, where an officer yanked the arm of an unarmed, non-violent plaintiff suspected of a $20 theft, pinning her against a wall hard enough to tear her rotator cuff, the court asked if this was the kind of error a reasonable officer might make in this factual context. 552 F.3d 12, *17 (1st Cir. 2009). It held it was not; as a rational jury could find the force

"objectively unreasonable and so plainly misguided," the officer was not protected by qualified immunity. Id. Conversely, Armstrong concerned the police response to a mentally ill man who resisted going to hospital by *inter alia* holding a sign—officers tased him five times, stood and kneeled on him, and left him shacked on the ground. 810 F.3d at *30–32 (majority opinion). As required, see al- Kidd, 563 U.S. at 742 ("[courts must] not . . . define clearly established law at a high level of generality"), the court defined the "particular" factual context precisely, and asked if the right not to be tased while offering stationary, non-violent resistance to a seizure was clearly established. Armstrong, 810 F.3d at *40. It held it was not; a case law survey showed defendants had insufficiently clear guidance to forfeit qualified immunity. Id. While lots of cases should have given them pause, others could have been construed to sanction the tasing. Id.

Here the question is whether the right not to be "drive stun" tased while belligerently, physically resisting a seizure was "clearly established." See Facts, ¶¶ 10, 14, 32, 36. Some cases could give sensible officers pause. See Oliver v. Fiorino, 586 F.3d 898, *53 (11th Cir. 2009) (denying qualified immunity to officers who tased non-suspect, compliant, non-fleeing plaintiff eight times, including after he was limp; force so unnecessary and disproportionate no reasonable officer could have thought it was legal in the circumstances); Brown v. City of Golden Alley, 574 F.3d 491, *64 (8th Cir. 2009) (denying qualified immunity as law clear enough to inform officer of unlawfulness of tasing non-fleeing, non-resisting, non-threatening misdemeanant).

Yet no First Circuit cases are similar enough to this case to permit the conclusion that the question is beyond debate. See, e.g., Ciolino, 861 F.3d at *12 (denying qualified immunity where plaintiff not physically resistant, nor viewed as threat, and officer did not have to quickly react). Indeed, as in Armstrong, 810 F.3d at *40, other pre-seizure cases could be construed to sanction the tasing, see Crowell v. Kirkpatrick, 400 F. App'x 592 *28 (2d Cir. 2010) (granting qualified

immunity as it "certainly was not clearly established" single drive stun tasings of physically resistant plaintiffs arrested for, *inter alia* resisting arrest, violated their constitutional rights under the case law); Hagans v. Franklin Cnty. Sheriff's Office, 695 F.3d 505, *56 (6th Cir. 2012) (granting qualified immunity as it was not clearly established repeated tasing of actively resisting suspect refusing handcuffs was excessive force as cases "adhere to this line: If a suspect actively resists arrest and refuses to be handcuffed, officers do not violate" Fourth Amendment by tasing to subdue); Bryan v. MacPherson, 630 F.3d 805 (9th Cir. 2010) (granting qualified immunity as reasonable officer could have made mistake on constitutionality of Taser use where officer "dart-mode" tased agitated, non-fleeing or verbally-threatening plaintiff standing 20 to 25 feet away).

Neither inside nor outside the First Circuit has the case law put the question of whether the right at issue is "clearly established" beyond debate. As there is no "consensus of cases," see Wilson v. Layne, 526 U.S. 603, *10 (1999), Officer Cummings is entitled to qualified immunity.

ii. Officer Cummings Did Not Violate Fourth Amendment In Arresting Plaintiff.

Even if the Court holds Officer Cummings was not entitled to qualified immunity, summary judgment for Defendants is appropriate because the force used was not excessive.

The right to arrest includes the right to use some physical coercion. Graham v. Connor, 490 U.S. 386, *5 (1989). Thus on an excessive force claim, a plaintiff must show the force used was unreasonable. Id. at 396. Reasonableness is assessed via the Graham factors: crime severity, if Plaintiff posed a safety threat, and if she resisted or evaded arrest. Id. Allowing for how police officers can be forced to make split-second choices about force use in tense, uncertain, and rapidly evolving circumstances, this is judged from a reasonable officer on scene's viewpoint. Id.

Where, as here, Graham factor one weighs for Plaintiff, a "reasonable" amount of force depends on whether plaintiff posed a safety or resistance risk. If there is no evidence a plaintiff

posed either, a moderate use of force is unreasonable, especially if it results in significant injury. See Morelli, 552 F.3d at *15 (holding unreasonable the slamming into wall of plaintiff posing no safety threat and not under arrest, causing rotator cuff tear); Parker v. Gerrish, 547 F.3d 1, *20–22 (1st Cir. 2008) (holding unreasonable the dart-mode tasing of non-fleeing, compliant plaintiff, who showed no sign of threat in long encounter with police pre-use of force, causing nerve and rotator cuff injury); Alexis v. McDonald's Restaurants of Massachusetts, 67 F.3d 353, *26 (1st Cir. 1995) (holding unreasonable the violent pulling of non-threatening, non-resisting plaintiff from eatery booth, causing bruising). Similarly, if there is *no or little* safety threat or flight risk, intermediate force, e.g., dart-mode tasing, is unreasonable. See Bryan, 630 F.3d at *68 (holding unreasonable the dart-mode tasing of compliant plaintiff who was 25-feet away, because darts lodge in flesh, requiring hospitalization and removal via scalpel and are thus intermediate, significant force); Casey v. City of Federal Heights, 509 F.3d 1278, *79–82 (10th Cir. 2007) (holding unreasonable the dart-mode tasing, plus repeated hitting of face into concrete ground, of non-fleeing, non-threatening, non-resisting plaintiff returning improperly taken file to courthouse); Oliver, 586 F.3d at *53 (holding unreasonable the repeated dart-mode tasings of a compliant, mentally ill man lying on hot pavement, which resulted in his death).

But evidence a plaintiff is a safety or flight-risk, or resists—which are all present here—can justify the use of some force, even when a seizure is to prevent self-harm. See Armstrong, 810 F.3d at *35 (holding where mentally ill man's seizure was to prevent self-harm, limited force would have been justified as it occurred roadside and he had fled hospital, making safety and flight concerns reasonable). Indeed, force such as a "drive stun" tasing is justified with an actively resisting plaintiff, even if Graham factors one and two favor them. See Crowell, 400 F. App'x at *28 (holding reasonable a "drive stun" tasing of non-threatening plaintiffs, arrested for

inter alia resisting arrest); cf. Brooks v. City of Seattle, 599 F.3d 1018, 1027 (9th Cir. 2010) (noting "drive-stun" tasing is painful, but does not cause significant lasting injury). This is especially so if a plaintiff is also "hostile, belligerent, and uncooperative." Draper v. Reynolds, 369 F.3d 1270, *87 (11th Cir. 2004) (holding single tasing of such a plaintiff reasonable); cf. Parker, 547 F.3d at *20 (noting defiance and insolence can at times be seen as suggesting threat).

Viewing the facts in the light favorable to Plaintiff, the Graham factors cut against her. Officer Cummings found her shoeless, walking roadside, after he was dispatched to find her and return her to the hospital. Facts, ¶¶ 4–8. Having fled the hospital and now walking away, she was a flight risk. Id. ¶¶ 4, 15. This justifies some force. See Anderson, 810 F.3d at *35. Once she stopped to face him at a distance of five feet, clenched her fists, teeth, and body, yelled "Fuck you!" and walked at him, see Facts, ¶¶ 20–22, she was a clear safety threat. This too justifies force and separates this case from those where the force used was held to be unreasonable, such as Morelli, 552 F.3d at *15; Parker, 547 F.3d at *22; and Alexis, 67 F.3d at *26, where evidence showed plaintiffs posed no safety threat. Coupled with her verbal resistance and belligerence, Facts, ¶ 10 ("'Fuck you!' [she] yelled at [him] immediately"); id. ¶ 12 ("I'm not fucking going back!"), which can also suggest a threat, see Parker, 547 F.3d at *20, it justifies the single tasing of Plaintiff, see Draper, 369 F.3d at *87. This "drive stun" tasing also distinguishes this case from those where a tasing was unreasonable, as there, the more painful, injurious "dart-mode" was used. See Bryan, 630 F.3d at *68 (holding unreasonable dart-mode tasing of compliant plaintiff); Casey, 509 F.3d at *82 (10th Cir. 2007) (same); Oliver, 586 F.3d at *53 (same).

This tasing occurred only after less force was tried, such as holding her shirt and taking her to ground, *and* after Plaintiff tucked in her arms thus physically resisting handcuffs, *and* after she did not comply with warnings to move her arms; this single drive stun tasing, permitting her

safe handcuffing, was reasonable. See Pl.'s Resp., ¶¶ 24A, 26A 26–28, 36, 42. Viewing the facts in the light most favorable to Plaintiff, a reasonable jury could not conclude Officer Cummings used excessive force; Defendants are entitled to qualified immunity and summary judgment.

B. Town Of Athol Is Not Liable For A Failure to Train.

To prevail on a failure to train claim, Plaintiff must show *inter alia* that: she suffered a constitutional deprivation, Smith v. City of Holyoke, No. CV 17-30078-FDS, 2020 WL 1514610, at *11 (D. Mass. Mar. 30, 2020) (quoting DiRico v. City of Quincy, 404 F.3d 464, 468–69 (1st Cir. 2005)), Athol had a custom, policy, or practice of failing to train its officers "so egregious that it gave rise to a constitutional violation," and Athol was deliberately indifferent to the failure to train, id. at *12. As a reasonable jury could not conclude excessive force was used on Plaintiff, she has not established a constitutional deprivation; summary judgment must be granted. However, independent bases for granting summary judgment are the lack of evidence showing that Athol had an egregious custom, policy, or practice of failing to train, or showing any past violations from which a reasonable jury could find Athol deliberately indifferent.

i. The Training Was Not So Deficient That It Was A Constitutional Violation.

In the 18 months before the encounter at issue, Officer Cummings was trained in Taser use and dealing with mentally ill persons, and the record has no facts permitting a conclusion this was so egregiously deficient as to be a constitutional violation. See Facts, ¶¶ 51, 55–57, 59.

To show a failure to train is a constitutional violation, Plaintiff must show an *egregious* training failure. Holyoke, 2020 WL 1514610, at *12. That training is imperfect or not Plaintiff's preferred form is insufficient. Young v. City of Providence ex Rel. Napolitano, 404 F.3d 4, 27 (1st Cir. 2005); Holyoke, 2020 WL 1514610, at *12 (holding expert critiques that vehicle stop was inadequate as it used too many officers, created chaotic scene and greater injury risk were

"at best" arguments training was imperfect and "insufficient . . . to establish a failure to train that rises to a constitutional violation."). Rather, a training "must be quite deficient," Young, 404 F.3d at 27, as when officers show such clear violations of, or "complete lack of familiarity" with, protocols that it raises disputes about if training took place, Holyoke, 2020 WL 1514610, at *12 (holding newly trained officer's total lack of familiarity with protocols and acts in clear violation of police operating policies could raise genuine dispute about if trainings "ever took place.")

Plaintiff has no evidence that would allow a rational factfinder to conclude the training at issue is so egregiously poor as to be constitutionally deficient. As in Holyoke, the expert critique of Athol police's actions, see, e.g., Pl.'s Resp., ¶ 9B ("Prior to getting out of his vehicle a trained, reasonable officer would have [*e.g.*,] called for another officer to subdue Judith using 'soft-handed techniques.'"), is a mere opinion the training was imperfect, see 2020 WL 1514610, at *12. That her proposed training could easily have resulted in the same outcome, see Lyman Dep. 23:15–16 (allowing changes "may or may not have worked" here), underlines how the expert's critiques show that the training is merely not in Plaintiff's preferred form; they fail to establish "a failure to train that rises to a constitutional violation," see Holyoke, 2020 WL 1514610, at *12.

Here there is no question that the training took place. See Facts ¶¶ 56–59 (noting Taser training); id. ¶¶ 52, 52A, 53–55 (noting training in dealing with persons with mental illness). Moreover, Officer Cummings did not show "a complete lack of familiarity" with protocols. See Cummings Dep. 15:21–22 (recalling when prompted some limits on Taser use on some people). Nor, despite Plaintiff's urging, see Lyman Dep. 119:25–120:1–2 (averring deescalation training violation), does she have evidence Officer Cummings so blatantly violated his training that it raises questions about if the training "ever took place," see id. 120:20–23 (misrelying on policy about Taser efficacy, not use limits, to assert violation of policy that "pain compliance may not

be effective against someone in a state of mind/body disconnect"); Lyman Dep. Ex. A, 12–13 (observing officer had to "infer" Plaintiff's "likely" state of mind, establishing he did not *know* her illness' severity, yet averring violation of policy that Tasers should not be used on "[t]hose known to be suffering from severe mental illness."); Pl.'s Resp., ¶6B. Thus despite her allegations, see, e.g., Pl.'s Resp., ¶¶ 9B–C (arguing trained officer would act differently); id. ¶¶ 13B, 31A (arguing tasing "inconsistent" with standards)—which are insufficient to defend against a motion for summary judgment, see Anderson, 477 U.S. at 250—there is no genuine dispute about whether training took place, or evidence it was egregiously deficient.

ii. Plaintiff Has No Evidence Supporting A Finding Of Deliberate Indifference.

Plaintiff must demonstrate the alleged failure to train shows "deliberate indifference." DiRico, 404 F.3d at 468–69. This requires showing town decisionmakers knew or should have known training was inadequate, yet exhibited a deliberate indifference to the inadequacies' unconstitutional effects. Gray v. Cummings, 917 F.3d 1, 14 (1st Cir. 2019). To establish such indifference plaintiffs "typically must show a pattern of similar constitutional violations by untrained employees." Id. (granting summary judgment as deliberate indifference not established where plaintiff failed to provide evidence of past violations that could have put town on notice of failure to train's effects); Holyoke, 2020 WL 1514610, at *13 (denying summary judgment on claim about vehicular pursuit where plaintiff provided evidence of past pursuit violation, as reasonable jury could conclude city was on notice as to propensity of its officers to use excessive force after such a pursuit, which could give rise to a deliberate indifference finding). As Plaintiff provides no evidence of similar constitutional violations, summary judgment must be granted.

V. Conclusion.

Defendants request the Court grant them summary judgment on Counts I and II.

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WRITING SAMPLE

The attached article is forthcoming in volume 37 (Summer 2022) of the BERKELEY JOURNAL OF GENDER, LAW & JUSTICE. It is titled,

"#UsToo": Empowerment and Protectionism in Responses to Sexual Abuse of Women with Intellectual Disabilities

This piece explores the incidence and dynamics of sexual abuse of persons with intellectual disabilities, evaluates recent legislation on this issue, and argues for a multi-prong approach to reducing gender-based abuse of women with disabilities.

I wrote this paper to satisfy the requirements of my Disability Rights Law class at Harvard Law School, taught by Professor Michael Ashley Stein. In order to prepare it for publication the attached version of the paper has been edited based on feedback from my professors and the journal's editorial staff.

"#UsToo": Empowerment and Protectionism in Responses to Sexual Abuse of Women with Intellectual Disabilities

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†. Lawyer in private practice. J.D., Harvard Law School; Ph.D., Georgetown University. The views expressed in this Article are mine alone and do not represent the views of my employer, and the errors are mine alone as well. Many thanks to the editorial and technical staff of the Berkeley Journal of Gender, Law & Justice, and to Professor Michael Ashley Stein for his very helpful comments on earlier drafts of this piece.

INTRODUCTION

When the #MeToo hashtag erupted on social media in late 2017, its widespread use was "a massive show of scale to prove that the issue [of sexual harassment and assault] is unavoidable."[1] The hashtag highlighted the extent of the global public health and human rights crisis of sexual violence. Just over a year later, a related story emerged out of Arizona. To the shock of her family and her caregivers at Hacienda HealthCare in Phoenix, a woman with "significant intellectual disabilities" (ID),[2] who could not "talk, walk or care for herself," had given birth—"[i]mmediately it was clear she had been raped."[3] Since the birth, the woman and her son have physically recovered, and she has left Hacienda and moved into another facility. The state of Arizona and one of her physicians settled with her family for $7.5 million dollars,[4] and the alleged assailant—a nurse at the Hacienda facility who "worked around the victim and treated her on numerous occasions"—was arrested, charged with sexual assault and vulnerable adult abuse, and eventually sentenced to ten years in prison.[5] As this Article explores, this assault, which garnered media attention around the globe, is unfortunately far from

1. Abby Ohlheiser, *Meet the Woman Who Coined 'Me Too' 10 Years Ago—to Help Women of Color*, CHI. TRIB. (Oct. 19, 2017), https://www.chicagotribune.com/lifestyles/ct-me-too-campaign-origins-20171019-story.html [https://perma.cc/5EKC-77TY]; *see also Deepen Your Understanding*, ME TOO., https://metoomvmt.org/learn-more/ [https://perma.cc/5DRX-EM3F].
2. There is a significant amount of conceptual slippage when it comes to the term "intellectual disabilities" in the literature on disabilities and sexual abuse. Sometimes authors include ID under the umbrellas of "cognitive disabilities" or "developmental disabilities." This is problematic as none of these terms are perfect synonyms—for instance, developmental disabilities can be cognitive or physical or both, while ID is cognitive alone. *Frequently Asked Questions on Intellectual Disability*, AM. ASS'N ON INTELL. & DEVELOPMENTAL DISABILITIES, https://aaidd.org/intellectual-disability/definition/faqs-on-intellectual-disability [https://perma.cc/TKS7-AUGM]. To best capture the issue at hand, this Article uses the term ID. In describing the extant research, however, this Article will replicate the terms researchers originally used so that their findings, and the applicability of these findings, can be assessed with as much precision as possible.
3. Amy Silverman, *After a Violent Crime, Arizona Promised Reforms for People with Developmental Disabilities. It Has Yet to Deliver.*, ARIZ. DAILY STAR & PROPUBLICA LOCAL REPORTING NETWORK (Dec. 28, 2020), https://tucson.com/news/local/after-a-violent-crime-arizona-promised-reforms-for-people-with-developmental-disabilities-it-has-yet/article_b56cc8e8-bc75-541c-8a7d-da557f2ae696.html [https://perma.cc/P8TP-PL73].
4. *Id.*
5. *Hacienda Healthcare: Nurse Arrested Amid Sexual Assault Investigation*, ABC 15 ARIZ. (Jan. 23, 2019, 7:23 AM), https://www.abc15.com/news/region-phoenix-metro/central-phoenix/hacienda-healthcare-investigation-phoenix-officials-give-update-on-sexual-assault-investigation [https://perma.cc/JZ8Y-X63W]; Perry Vandell, *Former Hacienda Nurse Who Raped, Impregnated Patient Sentenced to 10 Years in Prison*, AZ CENT. (Dec. 2, 2021, 4:47 PM), https://www.azcentral.com/story/news/local/phoenix-breaking/2021/12/02/hacienda-healthcare-nurse-nathan-sutherland-sentenced-to-10-years-in-prison/8831657002/ [https://perma.cc/84T3-FM8K].

an isolated incident. Sexual assault and abuse of women and girls with ID is rampant.

Alongside the efforts of women's and disability rights advocates, the #MeToo movement and the Hacienda HealthCare assault put the epidemic of sexual assault of persons with disabilities—particularly women with ID—on the legislative agenda of Arizona, other states, and the federal government. In Arizona, following the Hacienda incident, both elected branches of government responded rapidly. The Governor created a task force to improve protections for Arizona citizens similarly situated to the Hacienda victim.[6] Meanwhile, legislators proposed several bills specifically designed to prevent the recurrence of such violence.[7] Other states reacted similarly, by proposing legislation that aims to reduce the widespread sexual violence against women and girls with ID.

If passed, proposals like these have the potential to lower the rates of this form of violence, particularly those that target the enduring problem of caregiver abuse and foreground the concerns of activists with ID and their advocates. However, such proposals also have significant drawbacks. For instance, those that contain infantilizing language entrench disempowering and paternalist norms and practices. Similarly, those that fail to incorporate strategies suggested by domestic and international advocates, such as providing appropriate sexual education programs and shifting to a supported decision-making paradigm, also fail to challenge the societal marginalization of those with ID that ultimately enables this abuse. Because they do contain these shortcomings, the policy proposals examined herein are insufficient to address the problem at hand.[8]

The epidemic of violence against women and girls with ID and the continuing failures to address it are the focus of this Article. In considering this topic, Section I surveys how the #MeToo movement highlighted the stunningly high prevalence of sexual abuse in the United States, especially that experienced by women with ID. It then considers the ways in which women with ID face unique patterns of victimization. For instance, women with ID are assaulted by those known to them more often than are victims from other groups. Further, because of the social marginalization of women with ID, abusers often target them on the basis of their disability.

Section II considers government responses to the crisis of sexual abuse against women with ID and to the topic's political salience in the #MeToo era. It focuses on the wave of legislative proposals geared towards protecting persons with disabilities from this form of abuse that emerged in 2018 and 2019. Specifically, it analyzes seven such proposals from four states—Arizona, California, Massachusetts, and Pennsylvania—and pulls out common themes.

Section III evaluates these seven proposals. It finds several promising trends and several concerning patterns. The former include evidence that state legislators

6. *See infra* note 55–56 and accompanying text.
7. *See infra* notes 58–65, 192–195 and accompanying text.
8. *See infra* Sections III and IV.

are taking seriously both the high prevalence of caregiver abuse and the importance of listening to the needs of persons with ID. The latter include the endurance of infantilizing statutory language and a persistent focus on remedying the symptoms, rather than the root causes, of sexual abuse of women with ID. Because of these shortcomings, the Article concludes that the policies proposed in this wave of legislation are insufficient to tackle the high rates of sexual abuse of persons with disabilities—especially the abuse of women with ID.

Moving beyond an assessment of these seven bills, Section IV looks forward and considers other mechanisms to decrease rates of sexual abuse of women with ID. It argues for a multi-prong approach to reduce this abuse. This approach would center proposals from sexual violence researchers and disability rights advocates, which prioritize empowerment and rights-protecting measures over paternalist approaches. Section IV first considers relatively narrow proposals. These include mechanisms to interrupt would-be abusers through increased surveillance; strategies to increase prosecution of these assaults; and the provision of much-needed, appropriate post-abuse services to victims[9] with ID.

9. There is an ongoing debate among those working on issues related to sexual violence regarding the appropriate use of the terms "victim" and "survivor." *See, e.g.*, *Key Terms and Phrases*, THE RAPE ABUSE AND INCEST NAT'L NETWORK, https://www.rainn.org/articles/key-terms-and-phrases [https://perma.cc/3SH7-TWP2]; The Rape Abuse and Incest Nat'l Network, Natasha Alexenko, Jordan Satinsky & Marya Simmons, *Victim or Survivor: Terminology from Investigation Through Prosecution*, SAKI: SEXUAL ASSAULT KIT INITIATIVE, https://sakitta.org/toolkit/docs/Victim-or-Survivor-Terminology-from-Investigation-Through-Prosecution.pdf [https://perma.cc/L5KN-ZV96]. In this paper, the term "victim" is used throughout. *Inter alia*, this term is used herein to recognize the reality that not everyone survives sexual violence, and that the analyses in this Article are inclusive of those who do not survive it. *See, e.g.*, James R. Gill, Dennis P. Cavalli & Susan F. Ely, *Homicidal Neck Compression of Females: Autopsy and Sexual Assault Findings*, 3 ACAD. FORENSIC PATHOLOGY 454, 454 (2013) (finding an association with recent sexual activity/assault in 44 percent of deaths due to compression of the neck examined, and arguing that this "supports the common forensic maxim to consider sexual assault (and collect sexual assault evidence) in instances of suspected neck compression/smothering deaths. Similarly, one should suspect neck compression in deaths with evidence of a sexual assault."); *cf.* Renate R. Zilkens, Maureen A. Phillips, Maire C. Kelly, S. Aqif Mukhtar, James B. Semmens & Debbie A. Smith, *Non-Fatal Strangulation in Sexual Assault: A study of Clinical and Assault Characteristics Highlighting the Role of Intimate Partner Violence*, 43 J. FORENSIC & LEGAL MED. 1, 2 (2016) ("[Non-fatal strangulation] by an intimate partner is a recognised predictive risk factor for subsequent severe violence and is associated with a 7.5-fold increased risk of homicide. Other predictive risk factors for future violence or homicide by intimate partner include sexual assault, abuse during pregnancy and threats to kill."). "Victim" is also used because the term "victim" has a particular meaning within the legal context (*i.e.* in discussing a particular crime or aspects of the criminal legal system). The Rape Abuse and Incest Nat'l Network, Alexenko, Satinsky & Simmons, *supra*, at 1; *see* Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L.R. 465, 468 (2005) (observing the centrality of the status of "victim" in rape statute reforms, for instance, that "[o]n a symbolic level, the overarching goal [of many such reforms] was to alleviate the rape victim's second class status within the criminal justice system in order to make the treatment of rape victims, the overwhelming majority of whom are female, more consistent with that of other victim-witnesses in the system."). However, the use of "victim" in this Article is in no way intended to question the validity of others' use of "survivor," especially as it is used by

The Article concludes by considering broader reforms, which address the social marginalization and discrimination that women with ID face. These reforms include ensuring that these women have access to appropriate and effective sexual education, and replacing the commonly used surrogate decision-making model with a supported decision-making framework, such as that embraced by the United Nations Convention on the Rights of Persons with Disabilities (CRPD).

I. SEXUAL ABUSE OF PERSONS WITH ID: CONTEXT, INCIDENCE, CHALLENGES

Over the past few years, the #MeToo movement has brought the reality of epidemic sexual abuse to the foreground. While sexual abuse impacts all demographics, women with ID experience both particularly high rates of sexual violence and abuse, and unique patterns of victimization. For example, as compared to other victims of sexual violence, women with ID are more often assaulted by persons they knew pre-assault. And they are often targeted for abuse on the basis of their disability; while disability in no way causes sexual abuse, disability-related discrimination and social marginalization heighten the risk of sexual abuse.

Stories of sexual abuse have been in and out of news and political cycles for decades.[10] However, the #MeToo movement has resulted in particularly voluminous and high-profile coverage of sexual abuse involving victims with and without disabilities.[11] The origins of this movement are well-known: the "Me Too"

individuals and community-based advocates to describe "someone who has gone through the recovery process" after having been impacted by sexual violence. *See* THE RAPE ABUSE AND INCEST NAT'L NETWORK, *supra*.

10. Popular and political attention have long followed high-profile cases of abuse. For instance, after NBA star Kobe Bryant was charged with felony sexual assault in Colorado, hundreds of articles were published about the case—seventy in the *Denver Post* alone. Renae Franiuk, Jennifer L. Seefelt, Sandy L. Cepress & Joseph A. Vandello, *Prevalence and Effects of Rape Myths in Print Journalism: The Kobe Bryant Case*, 14 VIOLENCE AGAINST WOMEN 287, 287–88 (2008). Similarly, in 1989 when seven high school students in Glen Ridge, New Jersey were charged with sexually assaulting an intellectually disabled seventeen-year-old girl, newspapers tracked the case for years. Douglas Bicklen & Philip Lambert Schein, *Public and Professional Constructions of Mental Retardation: Glen Ridge and the Missing Narrative of Disability Rights*, 39 MENTAL RETARDATION 436, 436 (2001).

11. Noteworthy coverage that has emerged in the #MeToo era includes an NPR series on sexual assault experienced by those with ID. *See* Joseph Shapiro, *The Sexual Assault Epidemic No One Talks About*, NPR (Jan. 8, 2018), https://www.npr.org/2018/01/08/570224090/the-sexual-assault-epidemic-no-one-talks-about [https://perma.cc/4A5X-T83H] (covering sexual assault experienced by those with ID in a series of articles). Other key coverage of this issue includes the story, referenced in this Article's introduction, of the disabled woman with ID who gave birth to a baby at her long-term care facility after allegedly being raped by a nurse working at the facility. *See* Janelle Griffith, *Health Care Center Where Woman in Vegetative State Gave Birth Ordered to Hire Outside Manager*, NBC NEWS (Jan. 16, 2019), https://www.nbcnews.com/news/us-news/health-care-center-where-woman-vegetative-state-gave-birth-ordered-n959566 [https://perma.cc/UP67-JYC8]. The woman's family has since clarified that the story's assertion that the woman was in a vegetative state was in error; rather, she has "significant intellectual disabilities." Laura Lollman, *Phoenix Police Arrest 36-Year-Old Nurse in Hacienda HealthCare Rape*, AZFAMILY (Jan. 23, 2019),

phrase was inspired by a 1997 conversation Tarana Burke had with a girl who had been sexually abused.[12] Burke coined "Me Too" to help girls and women—particularly those of color who had, like her, experienced sexual assault—who were in need of resources and support.[13] The #MeToo hashtag went viral in October 2017 when, after accusations against producer Harvey Weinstein circulated for weeks, actor Alyssa Milano tweeted, "[i]f you've been sexually harassed or assaulted write 'me too' as a reply to this tweet."[14] #MeToo quickly spread, "redirect[ing] a conversation about one man toward one about the women who have survived sexual harassment or sexual assault. The hashtag is meant for the public, a massive show of scale to prove that the issue is unavoidable."[15] In the year following Milano's tweet, the hashtag was used 19 million times on Twitter, spreading across languages and beyond the entertainment industry.[16] Its widespread use reflected Burke's desire to show how pervasive sexual assault is across racial, cultural, and socioeconomic backgrounds.[17] Burke's assertion that sexual abuse impacts all communities finds strong empirical support. Related data paint a complex, intersectional picture of victimization between and within

https://www.azfamily.com/news/investigations/hacienda_healthcare/phoenix-police-arrest—year-old-nurse-in-hacienda-healthcare/article_bfb31fba-1f1c-11e9-a4fd-1f16462fb8e5.html [https://perma.cc/PR8G-78ZJ].

12. Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html [https://perma.cc/J2JY-29E8].
13. Ohlheiser, *supra* note 1.
14. Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 1:21 PM), https://twitter.com/alyssa_milano/status/919659438700670976?lang=en [https://perma.cc/2BBJ-RA9P]. While instrumental in popularizing the hashtag, Milano's tweet did not credit Ms. Burke, sparking criticism that this omission silenced and erased the contributions of Black women. Garcia, *supra* note 12.
15. Ohlheiser, *supra* note 1.
16. Hashtag use corresponded with salient events, such as TIME's naming of #MeToo activists as Person of the Year, the 75th Golden Globes Awards—where actresses and some actors wore black to make a statement about sexual harassment, and eight actresses walked the red carpet hand-in-hand with activists focused on sexual harassment and gender inequality, Brooke Barnes & Cara Buckley, *A Golden Globes Draped in Black Addresses #MeToo*, N.Y. TIMES (Jan. 7, 2018), https://www.nytimes.com/2018/01/07/movies/golden-globes.html?smid=url-share [https://perma.cc/4ZGL-SD85]—and Christine Blasey Ford's testimony at Brett Kavanaugh's Senate confirmation hearings. While seven-in-ten #MeToo tweets during high-usage periods were written in English, 29% during these periods were in other languages, including Afrikaans (7% of the total), Somali (4%) and Spanish (3%). *Methodology: Twitter Analysis*, PEW RSCH. CTR. (Oct. 11, 2018), https://pewresearch.org/wp-content/uploads/2018/10/FT_18.10.11_MeToo_MethodsTopline_final.pdf [https://perma.cc/F7L3-64BS]; *see also* Monica Anderson & Skye Toor, *How Social Media Users Have Discussed Sexual Harassment Since #MeToo Went Viral*, PEW RSCH. CTR.: FACTTANK (Oct. 11, 2018), https://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/ [https://perma.cc/L378-PLJH] (summarizing the frequency and breadth of social media use of the hashtag #MeToo).
17. Eugene Scott, *The Marginalized Voices of the #MeToo Movement*, WASH. POST (Dec. 7, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/12/07/the-marginalized-voices-of-the-metoo-movement/?utm_term=.e5b6ed0c00b4 [https://perma.cc/NK52-HDV2].

groups: sexual assault is pervasive, but its incidence varies by gender,[18] race,[19] age,[20] sexuality,[21] class,[22] location,[23] and other facets of identity,[24] including

18. Metanalyses indicate that women are victimized approximately two to five times as frequently as men, but studies vary on the gender differential found—one reported 96.2% of sexual assault victims in their analyses were female, and 3.8% were male. Netti Riggs, Debra Houry, Gayle Long, Vincent Markoychick & Kim M. Feldhaus, *Analysis of 1,076 Cases of Sexual Assault*, 35 ANN. EMERG. MED. 358, 360 (2000). Such estimates typically underrepresent male victims; research suggests they face greater stigma in reporting sexual violence and thus tend to be undercounted. Clayton M. Bullock & Mace Beckson, *Male Victims of Sexual Assault: Phenomenology, Psychology, Physiology*, 39 J. AM. ACAD. PSYCHIATRY L. 197, 197 (2011).
19. Broadly, persons of color experience sexual abuse at higher rates than White persons in the United States; the rate of rape victimization for White women is 18.8%, while it is 33.5% for multiracial non-Hispanic women. Michele C. Black, Kathleen C. Basile, Matthew J. Breiding, Sharon G. Smith, Mikel L. Walters, Melissa T. Merrick, Jieru Chen & Mark R. Stevens, *The National Intimate Partner and Sexual Violence Survey: Summary Report*, NAT'L CTR. INJURY PREVENTION AND CONTROL, CTR. FOR DISEASE CONTROL & PREVENTION 2–3, 20–21 (Nov. 2011). Similarly, the incidence of sexual violence other than rape is 21.5% for White men and 31.6% for multiracial men. *Id.*
20. Women ages 18–24 (regardless of school enrollment) experience higher rates of sexual assault than women in other age groups. Sofi Sinozich & Lynn Langton, *Rape and Sexual Assault Victimization Among College-Age Females, 1995–2013*, U.S. DEP'T OF JUST. 1 (Dec. 2014). But age of victimization varies by gender: 12.3% of female victims were 10 or younger at the time of their first completed rape victimization, while this is true for 27.8% of male victims. Black et al., *supra* note 19, at 2.
21. One study found that "men who reported having consensual sex with other men were six times more likely to have had nonconsensual sex as an adult, compared with men reporting only consensual experiences with women." Bullock & Beckson, *supra* note 18, at 200; *see also* Gene R. Pesola, Richard E. Westfal & Carol A. Kuffner, *Emergency Department Characteristics of Male Sexual Assault*, 6 ACAD. EMERG. MED. 792, 792 (1999) (finding 12% of sexual assault victims who reported to an emergency department in the West Village of New York City were male, and 63% of these men self-identified as gay or bisexual).
22. The 2017 National Crime Victimization Survey found "people with household incomes of less than $7,500 reported a victimization rate of 4.8 incidents per 1,000 persons age 12 or older, which is 12 times the rate reported by those with household incomes greater than $75,000 (0.4 per 1,000)." Kathryn Casteel, Julia Wolfe & Mai Nguyen, *What We Know About Victims of Sexual Assault in America*, FIVETHIRTYEIGHT (Jan. 2, 2018), https://projects.fivethirtyeight.com/sexual-assault-victims/ [https://perma.cc/X3HB-YWL6]; *see also* Rachel E. Morgan & Jennifer L. Truman, *Criminal Victimization, 2017*, U.S. DEP'T OF JUST. 1, 19 (Dec. 2018) (showing that rates of violent victimization vary by household income).
23. People in urban areas report higher rates of rape and sexual assault compared to those in rural areas, while the rate is lowest in suburban areas. Casteel, Wolfe & Nguyen, *supra* note 22. But rural victims face unique challenges, including physical isolation and social norms that make it particularly difficult to access resources. *Id.*; *see also* Danielle Paquette, *You Have to Drive an Hour for a Rape Kit in Rural America*, WASH. POST (Apr. 19, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/04/19/you-have-to-drive-an-hour-for-a-rape-kit-in-rural-america/?utm_term=.66b9635b0191 [https://perma.cc/2VHW-Z3HG] (describing shortage of medical examiners available to collect DNA evidence in rural counties).
24. *See, e.g.*, *Sexual Violence & Transgender/Non-Binary Communities*, NAT'L SEXUAL VIOLENCE RSCH. CTR. 1, 1 (2019), https://www.nsvrc.org/sites/default/files/publications/2019-02/Transgender_infographic_508_0.pdf [https://perma.cc/HDM6-PP43] (citing SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET & MA'AYAN ANAFI, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY (2016),

disability.

Indeed, the variance seen when disability and sexual abuse is explored is striking. The rate of sexual assault victimization is 2.1 per one thousand for people with disabilities and 0.6 per one thousand for persons without.[25] For persons with ID, the picture is even starker. People with ID are sexually assaulted at a rate of 4.4 per one thousand people.[26] Disaggregating these figures by gender, the rates are a staggering 7.3 for women with intellectual disabilities and 1.4 for similarly situated men.[27] These data are based on the noninstitutionalized population, so they likely underestimate these rates, but widely accepted estimates indicate that women with cognitive disabilities are *twelve times* more likely to be sexually assaulted than are people without disabilities.[28] While these numbers demonstrate that men and boys with ID certainly suffer sexual abuse, this paper focuses on women with ID because these women are uniquely impacted by the intersection of their gender and disability.

Exploring data on disability and sexual abuse not only reveals staggering rates of abuse but also illuminates patterns of victimization that point to some of the causes of these high rates. For instance, a higher-than-average percentage of violence against persons with disabilities was committed by persons the victim knew.[29] Regarding sexual victimization of women with ID, this pattern reflects the extant research which suggests that there is "usually a relationship between the victim and perpetrator before abuse occurred, with perpetrators described as family members, acquaintances, service providers, personal care staff,

https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF [https://perma.cc/R9LK-RPET]) ("Almost half of all transgender people have been sexually assaulted at some point in their lives, and these rates are even higher for trans people of color and those who have done sex work, been homeless, or have (or had) a disability.").

25. Erika Harrell, BUREAU OF JUST. STATS., NCJ 250632, CRIME AGAINST PERSONS WITH DISABILITIES, 2009–2015—STATISTICAL TABLES 3 tbl.2 (2017). A differential is also found for violent crime more generally: persons who self-reported as disabled have a higher rate of violent victimization than persons without disabilities. Morgan & Truman, *supra* note 22, at 10. Further, between 2009 and 2015, the rate of *serious* violent crime—rape or sexual assault, robbery, and aggravated assault—for persons with disabilities was more than three times the rate for persons without disabilities. Harrell, *supra*, at 1. This gap is racialized: there was no statistical significance between the victimization rates of Black, White, and Hispanic persons with disabilities (about 30 per 1,000), but rates for persons without disabilities varied according to race: 18.2 (per 1,000) for Black persons, 12.0 for White persons, and 13.0 for Hispanic persons. *Id.* at 4.
26. Shapiro, *Sexual Assault Epidemic*, *supra* note 11. For violent crime, serious violent crime, simple assault, and sexual assault, persons with ID have a higher victimization rate than those with other disability types and those without a disability; "[p]ersons with a cognitive disability experienced 76.0 violent victimizations per 1,000 persons age 12 or older, the highest rate among persons with any disability." Morgan & Truman, *supra* note 22, at 4.
27. *See* Appendix, Chart 1; Shapiro, *Sexual Assault Epidemic*, *supra* note 11.
28. ARIZ. DEVELOPMENTAL DISABILITIES PLAN. COUNCIL, SEXUAL ABUSE OF ARIZONANS WITH DEVELOPMENTAL AND OTHER DISABILITIES: 2019 LEGISLATIVE AND REGULATORY RECOMMENDATIONS FOR PREVENTION 1 (2019).
29. Harrell, *supra* note 25, at 6.

psychiatrists, or residential care staff."[30] Staff sexual abuse is an enduring challenge; a 1991 study found that 44 percent of perpetrators of sexual abuse against persons with disabilities came into contact with their victim as service providers.[31] More recently, other researchers found that abuse perpetrated by staff working with persons with developmental disabilities "increased substantially over the 15 years" of their study.[32]

The targeting of victims on the basis of their perceived disability is an important part of this pattern of abuse. One in five violent crime victims with disabilities believes they were targeted due to their disability.[33] This targeting is particularly relevant in the context of sexual abuse and ID; as Nancy Thaler, deputy secretary of Pennsylvania's Department of Human Services, explained,

> [f]olks with intellectual disabilities are the perfect victim . . . [t]hey are people who often cannot speak or their speech is not well-developed. They are generally taught from childhood up to be compliant, to obey, to go along with people. Because of the intellectual disability, people tend not to believe them, to think that they are not credible or that what they [are] saying, they are making up or imagining . . . so for all these reasons, a perpetrator sees an opportunity, a safe opportunity to victimize people.[34]

Thaler's words have been echoed by survivors. One woman with ID who is a survivor of sexual assault explained that she was victimized "because we're easy targets to take advantage of. We think that the people that we're around, we can trust them, but you don't know that by looking at 'em."[35]

These findings reinforce how women and girls with ID are targeted, often by those they know, *because* of their ID. To be clear, it is neither disability nor the characteristics of a specific disability that increase risk of victimization from sexual abuse. Rather, it is the way society marginalizes people with disabilities. Key factors that contribute to this marginalization include

30. Amanda Mahoney & Alan Poling, *Sexual Abuse Prevention for People with Severe Developmental Disabilities*, 32 J. DEV. PHYS. DISABILITIES 369, 369 (2011).
31. Dick Sobsey & Tanis Doe, *Patterns of Sexual Abuse and Assault*, 9 SEXUALITY & DISABILITY 243, 248 (1991).
32. Mahoney & Poling, *supra* note 30, at 372 (citing Bob McCormack, Denise Kavanagh & Shay Caffrey, *Investigating Sexual Abuse: Findings of a 15-Year Longitudinal Study*, 18 J. APPLIED RSCH. INTELL. DISABILITIES 217, 227 (2005)).
33. Harrell, *supra* note 25, at 4.
34. Shapiro, *Sexual Assault Epidemic*, *supra* note 11. Jessica Oppenheim of the Arc of New Jersey similarly notes that people with ID are more likely to be victimized because "[o]ffenders are going to look for an easier target. And someone who doesn't feel they have the right to say anything, someone who may not understand what their rights are, someone who's not comfortable—or maybe is even afraid to say anything—makes for an easier target." Joseph Shapiro, *States Aim to Halt Sexual Abuse of People with Intellectual Disabilities*, WBUR (June 25, 2018), https://www.wbur.org/npr/623189167/states-aim-to-halt-sexual-abuse-of-people-with-intellectual-disabilities [https://perma.cc/W652-UM8T].
35. Joseph Shapiro, *In Their Own Words: People with Intellectual Disabilities Talk About Rape*, NPR (Jan. 20, 2018), https://www.npr.org/2018/01/20/577064075/in-their-own-words-people-with-intellectual-disabilities-talk-about-rape [https://perma.cc/W652-UM8T].

> negative public attitudes towards persons with disabilities; social isolation; lack of accessible transportation; reliance on others for care; communication barriers; lack of knowledge about healthy intimate relationships; type of disability; lack of resources/lack of knowledge of existing resources; poverty; [people with disabilities'] lack of control of their personal affairs; [and a] perceived lack of credibility when they disclose sexual victimization.[36]

Ultimately, the "multiple or heightened forms of discrimination" women and girls with disabilities—especially ID—face creates a heightened risk of violence, injury, maltreatment, and exploitation.[37] That risk translates into the high rates seen above.

Unfortunately, the legal system has been of little help in addressing sexual assault of those with ID. First, "[t]he vast majority of sexual assault cases against victims with mental disabilities pass without legal intervention."[38] This is partly due to "exceptionally low" reporting rates and inadequate response by the criminal legal system when reports are filed.[39] Second, current sexual abuse statutes "generally fail to thwart the sexual abuse of adults with cognitive disabilities . . . . [A]lthough the intention of these statutes is to protect, [they] instead stem from and perpetuate a legacy of systematic oppression that includes the sexual exploitation and deprivation of people with cognitive impairments."[40] With this perpetuation, such statutes undermine "one of the most basic and fundamental of all civil and human rights[,] the right to sexual interaction,"[41] by employing definitions of consent that render "all sexual activity of people with cognitive impairments illegal."[42]

Generalist anti-sexual abuse legislation is unlikely to appreciably lower the elevated rate of sexual abuse that women with ID experience because this rate is driven by social, legal, and political marginalization. All victims might benefit from general anti-sexual violence strategies, such as legislation addressing the backlog in rape kit testing,[43] but it is unlikely that the incidence gaps between

36. TRAINING AND COLLABORATION TOOLKIT, SEXUAL VICTIMIZATION OF PERSONS WITH DISABILITIES: PREVALENCE AND RISK FACTORS, W. VA. S.A.F.E. at B1.1 (Sept. 2010).
37. Robyn M. Powell & Michael Ashley Stein, *Persons with Disabilities and their Sexual, Reproductive, and Parenting Rights: An International and Comparative Analysis*, 11 FRONTIERS L. CHINA 53, 70 (2016).
38. Julia L. Wacker, Susan L. Parish & Rebecca J. Macy, *Sexual Assault and Women with Cognitive Disabilities: Codifying Discrimination in the United States*, 19 J. DISABILITY POL'Y STUD. 86, 88 (2008).
39. *Id.* at 88. Challenges to redress this problem through criminal law persist throughout the entirety of the criminal legal system. Prosecution rates are low, as are conviction rates. Moreover, because of the standard course of such court proceedings, both juries and judges are predisposed to "view the victim's testimony through a discriminatory, differential lens that would never be used to evaluate the testimony of nondisabled victims." *Id.* at 88–89.
40. *Id.* at 86.
41. MICHAEL L. PERLIN & ALISON J. LYNCH, SEXUALITY, DISABILITY, AND THE LAW 29 (2016).
42. Wacker et al., *supra* note 38, at 86.
43. *Addressing the Rape Kit Backlog*, THE RAPE ABUSE AND INCEST NAT'L NETWORK, https://www.rainn.org/articles/addressing-rape-kit-backlog [https://perma.cc/H5C5-2THC].

those with and those without ID will narrow without efforts to mitigate the above-discussed factors. These factors are particularly salient when evaluating proposed strategies to reduce rates of sexual abuse of people with ID—the focus of the next section.

II. RECENTLY PROPOSED LEGISLATION RELATING TO SEXUAL ABUSE AND PERSONS WITH ID

Since #MeToo went viral in October 2017, there has been a wave of legislative proposals geared towards protecting persons with disabilities from abuse. During this period, bills on this issue have been proposed at the federal level,[44] and in the states, including in Arizona,[45] California,[46] Massachusetts,[47] and Pennsylvania.[48] A comprehensive analysis of the state and federal legislation relating to sexual abuse and disability that has been proposed in these years is beyond the scope of this paper,[49] nevertheless, the legislation proposed in Arizona, California, Massachusetts, and Pennsylvania during 2018 and 2019 creates a compelling sample of the nation. These states have similar rates of disability[50] but are otherwise quite diverse when it comes to key variables such as politics,[51]

44. CARE Act, H.R. 505, 116th Cong. (2019). This would amend the Violence Against Women Act "to reauthorize the grant program for education, training, and enhanced services to end violence against and abuse of women with disabilities."
45. S.B. 1211, 54th Leg., 1st Reg. Sess. (Ariz. 2019); H.B. 2665, 54th Leg., 1st Reg. Sess. (Ariz. 2019); H.B. 2666, 54th Leg., 1st Reg. Sess. (Ariz. 2019). In Arizona, this was also sparked by the highly publicized rape of a woman with ID at a Hacienda HealthCare in Phoenix. *See* Amy Silverman, *'It Could Be Any of Us': Arizona Patient's Sexual Assault Reveals Lack of Protection*, THE GUARDIAN (Feb. 3, 2019), https://www.theguardian.com/us-news/2019/feb/03/arizona-hacienda-healthcare-assault [https://perma.cc/DDQ5-5B8W].
46. A.B. 2359, 2017–2018 Reg. Sess. (Cal. 2018).
47. S. 71, 191st Leg., Reg. Sess. (Mass. 2019).
48. H.B. 2325, 2017–2018 Reg. Sess. (Pa. 2018).
49. An initial search for proposed bills did not turn up other related proposed bills from the period between 2018 and early 2019, but a more rigorous search and a nationwide assessment would be a productive area for future research. This author would be particularly interested in research assessing stakeholder involvement in policy development, and how this varies and shapes legislation—for instance, was a bill drafted and lobbied for by health care providers or group home owners? Did consultation include persons with disabilities and their advocates? Understanding this could be particularly helpful in determining how more empowering legislation could be lobbied for and passed and also in developing model statutes.
50. The proportion of noninstitutionalized civilians with a disability is relatively similar across these states, ranging from a high of 14.1% in Pennsylvania to a low of 10.6% in California. A portion of the existing variation can be explained by looking at the proportion of the population older than 62 in each state: this proportion is 21.8% in Pennsylvania, while it is only 17.3% in California. U.S. Census Bureau, *2017 American Community Survey 1-Year Estimates* (Sept. 13, 2018), https://www.census.gov/newsroom/press-kits/2018/acs-1year.html [https://perma.cc/PTQ6-4QZN]. This correlation is significant as the likelihood of having a disability increases with age. *See* Danielle M. Taylor, U.S. Census Bureau, *Americans with Disabilities: 2014*, P70-152 HOUSEHOLD ECON. STUD. 2 (Nov. 29, 2018).
51. In the 2016 election, a plurality of voters in two of these four states supported Trump: Arizona (48.1% voted for Trump) and Pennsylvania (48.2% voted for Trump). *See* N.Y. TIMES, *Presidential Election Results* (Aug. 2017),

race,[52] poverty,[53] and geography. Furthermore, looking at all four states within a limited time period[54] mitigates selection bias issues that could result from only examining a single state. For instance, in Arizona the high-profile Hacienda HealthCare incident clearly drove correspondingly high-profile political efforts.[55] Indeed, beyond the legislative activity explored herein, in response to this incident "Republican Gov. Doug Ducey created a task force charged with finding ways to improve services and protections for some of Arizona's most vulnerable residents. . . . [It was m]ade up of more than 40 agency heads, legislators, health care providers, group home operators and advocates."[56] Some of the bills analyzed in this Article focus on disability in general while others specifically address sexual abuse and ID, but examining these various reform proposals together illuminates the impact that #MeToo, media coverage of sexual assault of those with ID, and related activism has had on legislators.

Four themes emerge from the seven proposals analyzed herein.[57] First,

https://www.nytimes.com/elections/2016/results/president [https://perma.cc/L6PG-BG4W]. The majority in the other two supported Clinton: California (61.5% for Clinton) and Massachusetts (60.0% for Clinton). *Id.*

52. Massachusetts and Pennsylvania have relatively homogenous populations, at 76.1% and 79.8% non-Hispanic White, respectively, while Arizona and California are more racially diverse, with populations 57.8% and 40% non-Hispanic White, and 29.6% and 37.6% Hispanic, respectively. U.S. CENSUS BUREAU, *2010 Census* (2011).
53. The percentage of related children under 18 years old who were below the poverty line in the last 12 months ranges from 23.7% in Arizona to 14.3% in Massachusetts (with 20.4% in California and 18.2% in Pennsylvania). For context, in the 50 U.S. states, the overall range is from 29.9% (Mississippi) to 9.6% (New Hampshire), so the four states represented herein represent a relatively wide range of the spread on this measure. U.S. CENSUS BUREAU, *2010 Census* (2011). Further, the median family income in these states varies from $63,812 in Arizona to $94,110 in Massachusetts—with California ($76,975) and Pennsylvania ($72,692) hovering between these values. U.S. CENSUS BUREAU, *2013-2017 American Community Survey 5-Year Estimates* (Sept. 13, 2018).
54. The legislation considered was proposed in 2018 and early 2019. Since this time period, other legislation on this issue has been proposed, including in other states. As one example, "Harrison's Law," which would require a Sexual Assault Response Team to include a person trained in interacting with persons with developmental disabilities, was introduced in New Jersey in November 2019. *See* S.B. 4173, 2018–2019 Leg. Sess. (N.J. 2018). Although it died in committee during the 2018–2019 legislative session, it was reintroduced during the 2020–2021 legislative session, *see* S.B. 1596, 2020–2021 Leg. Sess. (N.J. 2020), and once again was referred to committee. In Massachusetts, similar legislation ultimately passed; in February 2020, Governor Charlie Baker signed into law a measure intended to "give[] more protections to individuals with developmental and intellectual disabilities [by] . . . establish[ing] a registry for caretakers in Massachusetts who have been found to have caused serious physical or emotional injury to people with disabilities." *See New Law Gives Added Protections for Persons with Disabilities*, MASS. L. UPDATES (Feb. 20, 2020), https://blog.mass.gov/masslawlib/new-laws/new-law-gives-added-protections-for-persons-with-disabilities [https://perma.cc/B946-DKUE].
55. Stephanie Innes, *Two More Bills Related to Hacienda HealthCare Rape Introduced in Arizona Legislature*, ARIZ. REPUBLIC (Feb. 12, 2019), https://www.azcentral.com/story/news/local/arizona-health/2019 /02/12/hacienda-healthcare-arizona-bills-related-patient-rape-introduced-rep-jennifer-longdon/2803858002 [https://perma.cc/ST8A-HJAT].
56. Silverman, *supra* note 3.
57. A comprehensive description of each bill's key components can be found in Table 1 (Appendix), and the key themes can be found in Table 2 (Appendix).

proposals in three jurisdictions focused on addressing and improving law enforcement practices (federal, California, Pennsylvania). Second, two jurisdictions proposed creating or enhancing an abuser registry (Arizona and Massachusetts). Third, one jurisdiction would have required employee and family training (Arizona would have required that those who work with people with ID become mandatory reporters and receive training on spotting signs of abuse—including sexual abuse—and would also have opened such training to family). Fourth, one jurisdiction would have required victim services to be provided to survivors of sexual abuse who have ID (California—though this is not the legislation's central feature).

III. RECENT LEGISLATION: EVALUATION AND CONTEXTUALIZATION

Examining these seven bills within two broader contexts—existing sexual assault legislation and the causes of high rates of abuse of women and girls with ID—reveals a few promising trends as well as several deeply concerning patterns. Positive developments include state legislators taking seriously both caregiver abuse and the importance of listening to the needs of persons with ID. Concerning patterns include the use of infantilizing language and a focus on remedying the symptoms rather than the root causes of this abuse. As a result of these latter patterns, the examined proposals, and those similarly structured, are unlikely to address marginalization of persons with ID, which is a core problem that enables pervasive sexual abuse.

A. Points of Progress: Taking Caregiver Abuse Seriously and Listening to Those with ID

Encouragingly, a number of the legislative proposals examined show that some state legislators are taking the enduring problem of caregiver abuse seriously. Proposed statutes in Arizona and Massachusetts would both have created registries of care providers against whom allegations of abuse have been made and mandated significant penalties for care facilities that fail to meet registry-use standards.[58] The Arizona bill would have made failure to report a sex offense committed against a "vulnerable adult"[59] a Class 6 felony and failure to report other forms of abuse a Class 1 misdemeanor.[60] The bill would have also required employees who work with vulnerable adults to receive training on spotting abuse.[61] This provision is particularly important as surveys "suggest that service providers lack basic knowledge about sexual abuse, including typical

58. *See* S. 71, 191st Leg., Reg. Sess. (Mass. 2019); H.B. 2666, 54th Leg., 1st Reg. Sess. (Ariz. 2019).
59. An "individual who is eighteen years of age or older and who is unable to protect himself from abuse, neglect or exploitation by others because of a physical or mental impairment." H.B. 2666, 54th Leg., 1st Reg. Sess. (Ariz. 2019).
60. *See* H.B. 2666, 54th Leg., 1st Reg. Sess. (Ariz. 2019).
61. *Id.*

perpetrator characteristics and potential victims."[62] And it reflects suggestions from advocacy groups to improve the laws and regulations governing the qualifications and screening of caregivers.[63] However, these training programs must be designed carefully as some attempts to increase staff knowledge through sexual abuse prevention trainings have not been effective at increasing staff knowledge or reducing sexual assault.[64]

The centrality of caregiving facilities and staff to the evaluated proposals from Arizona is understandable since these bills were largely prompted by high-profile incidents of abuse, such as the rape of a woman with ID at Hacienda HealthCare in Phoenix.[65] Tragically, the Hacienda case is not the only recent high-profile example of sexual violence committed against a significantly disabled woman with ID. The same year that the Hacienda case attracted global attention,

> a Lubbock, Texas maintenance man was charged . . . with sexually assaulting a disabled woman in her apartment where she is under nearly 24-hour supervision due to the extent of her disability. In a case reported [eight days later], a developmentally disabled, nonverbal woman, 23, who cannot move on her own and is fed through a tube, was raped and impregnated at a Pensacola facility for children and young adults. That same day, in Indiana, a man was charged with raping a nonambulatory, disabled woman while her mother was sleeping.[66]

As the sexual abuse of disabled women is epidemic, particularly in institutional care settings, and research indicates people with severe developmental disabilities are at the highest risk of all for sexual abuse,[67] that proposed legislation recognizes and tries to address the danger of caregiver abuse is a positive step forward. An additional and related positive step is that legislators appear to be working with and responding to, rather than ignoring, disability rights advocates' concerns about existing laws. For example, legislators in Arizona proposed registry requirements in response to advocate concerns—including those voiced by Asim Dietrich, staff attorney at the Arizona Center for Disability Law—

62. Mahoney & Poling, *supra* note 30, at 373.
63. THE ARC OF N.J., ADDRESSING SEXUAL VIOLENCE AGAINST PEOPLE WITH I/DD: BLUEPRINT FOR AN EMPOWERED FUTURE 6 (Sept. 6, 2018).
64. Mahoney & Poling, *supra* note 30, at 373.
65. *See Hearing on S.B. 1211 Before the Ariz. H. Health and Human Services Comm.*, 54th Leg., 1st Reg. Sess. (2019) (statement of Arizona State Sen. Heather Carter, sponsor) http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=22491 [https://perma.cc/KMD3-ARH9] ("This bill was brought forth through a very comprehensive stakeholder process, following the tragic situation . . . related to the Hacienda situation."); *see also* S.B. 1211, 54th Leg., 1st Reg. Sess. (Ariz. 2019) (proposing further protections for vulnerable adults); H.B. 2665, 54th Leg., 1st Reg. Sess. (Ariz. 2019) (providing training and education on signs of sexual abuse to health professionals caring for vulnerable adults); H.B. 2666, 54th Leg., 1st Reg. Sess. (Ariz. 2019) (making it mandatory for health professionals to report abuse of vulnerable adults); Silverman, *supra* note 45.
66. Victoria Brownworth, *Raped, Abused, and Ignored: Disabled Women Are Invisible Victims*, DAME MAG. (Jan. 31, 2019), https://www.damemagazine.com/2019/01/31/raped-abused-and-ignored-disabled-women-are-invisible-victims [https://perma.cc/P8KX-G9DD].
67. Mahoney & Poling, *supra* note 29, at 372.

that existing legal loopholes might allow convicted criminals to obtain work at care facilities like Hacienda HealthCare.[68]

State-level representatives are not the only legislators who have responded to the caregiver abuse issue; federal legislators have likewise done so, but they have largely focused on police and prosecutors' failure to effectively address this form of sexual abuse. For instance, the CARE Act, which died in committee,[69] would have directed the U.S. Attorney General to determine best practices for law enforcement and prosecutors in sexual assault cases involving the victimization of persons with disabilities, including ID.[70] This would have been an imperfect solution as it depends on the Attorney General for implementation, and any given Attorney General's views on best practices in this area might not necessarily be empowering.[71] California legislators likewise proposed reforms to the prosecution of sexual abuse of persons with ID.[72] Under California's proposed measure, the state would have awarded funds to district attorney offices that employ a vertical prosecution methodology for sexual assault crimes involving disabled victims.[73] With vertical prosecution, the "same prosecutor, who has specialized training in sensitive crime issues, is assigned to the case from beginning to end."[74] The benefits of this strategy are well established: vertical prosecution improves conviction rates, reduces victim trauma, and provides more consistent, appropriate sentencing.[75] While data on how vertical prosecution units serve sexual assault victims with disabilities are largely anecdotal, and none have been published on how well such units support victims with ID specifically, the available evidence suggests that these units are "enormously supportive to people with disabilities . . . [and] result in an increase in convictions in crimes against people with disabilities."[76]

68. Silverman, *supra* note 45.
69. The last action taken on this bill was its referral to the House Committee on the Judiciary. *See* 165 CONG. REC. H517 (daily ed. Jan. 11, 2019).
70. CARE Act, H.R. 505, 116th Cong. (2019).
71. For example, former Attorney General William Barr "called the Violence Against Women Act (VAWA) a 'bad idea,' implied that it was a 'crime du jour' and said it was not in the 'legitimate interest' of the federal government." Nicole Goodkind, *William Barr, Trump's Pick for Attorney General, Once Called Violence Against Women Act a 'Bad Idea,'* NEWSWEEK (Jan. 24, 2019), https://www.newsweek.com/william-barr-trump-violence-against-women-act-bad-idea-1303939 [https://perma.cc/25PX-T488].
72. This bill died in committee after being introduced in 2018 and does not appear to have been reintroduced. *See AB-2359 Sexual Assault Crimes Against Disabled and Developmentally Disabled Victims*, CAL. LEGIS. INFO., http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201720180AB2359 [https://perma.cc/MR7P-WRQ5].
73. A.B. 2359, 2017–2018 Reg. Sess. (Cal. 2018).
74. WIS. COAL. AGAINST SEXUAL ASSAULT, WISCONSIN ADULT SEXUAL ASSAULT RESPONSE TEAM PROTOCOL 22 (May 2011).
75. *Id.*
76. Joan Petersilia, Joseph Foote & Nancy A. Crowell, *Treatment Issues*, *in* CRIME VICTIMS WITH DEVELOPMENTAL DISABILITIES: REPORT OF A WORKSHOP 57, 60 (2001).

B. Areas for Improvement: Adopting a Framework of Infantilization and Focusing on the Symptoms Rather than the Causes of Abuse

While these various proposals include some important steps forward, they also contain deeply concerning elements. One such element is the adoption of a framework that embraces, rather than challenges, the infantilization of people with ID. In the context of disability, infantilization is a form of ableism that occurs when a disabled person is treated "like a child."[77] It takes many forms,[78] including

> talk[ing] to someone as though they are a child, i.e., baby talk. This way of interacting with disabled people happens because . . . the disabled person is [believed] either [to be] cute, younger than they are, or [to possess] lower cognitive development than [the speaker]. . . . Another form of infantilisation is when [a speaker] address[es] the able bodied person and not the disabled person them self. . . . And then there is infantilisation by not affording disabled people the right to express and experience adult behaviours, experiences, and habits.[79]

As disability activist and Paralympic medalist Elizabeth Wright argues, infantilization "perpetuates the stigma and tropes that surround disability."[80] In the context of persons with ID specifically, infantilization "undermines their status as autonomous agents, curbing their opportunities to make choices in their daily lives."[81]

One bill that was proposed in Pennsylvania provides an example of the infantilization phenomenon. The bill, which the Pennsylvania legislature debated

77. Elizabeth Wright, *Infantilising Disabled People is a Thing and You're Probably Unconsciously Doing It.*, MEDIUM (Jan. 13, 2020), https://medium.com/age-of-awareness/infantilising-disabled-people-is-a-thing-and-youre-probably-unconsciously-doing-it-1adf91dc0fc5 [https://perma.cc/GP5V-V8AL].

78. Infantilization can vary by disability type. For example, in the context of autism, infantilization manifests in several ways, "including the depiction of autism as a child-bound disability by parents, charitable organizations, the popular media, and the news industry." Jennifer L. Stevenson, Bev Harp & Morton Ann Gernsbacher, *Infantilizing Autism*, 31 DISABILITY STUD. Q. (2011).

79. Wright, *supra* note 77.

80. *Id.*; *see also* Kenneth L. Robey, Linda Beckley & Matthew Kirschner, *Implicit Infantilizing Attitudes About Disability*, 18 J. DEVELOPMENTAL & PHYSICAL DISABILITIES 441, 451 (2006) (finding evidence of infantilization of persons with disabilities and "considerable evidence for negative implicit evaluative attitudes" tied to this infantilization).

81. Kristín Björnsdóttir, Ástríður Stefánsdóttir, & Guðrún Valgerður Stefánsdóttir, *People with Intellectual Disabilities Negotiate Autonomy, Gender and Sexuality*, 35 SEXUALITY & DISABILITY 295, 296 (2017); *see also* Elizabeth Murphy, Jennifer Clegg & Kathryn Almack, *Constructing Adulthood in Discussions About the Futures of Young People with Moderate-Profound Intellectual Disabilities*, 24 J. APPLIED RSCH. INTELL. DISABILITIES 61, 72 (2010) (highlighting how infantilization is problematic, disfavored, and regressive by noting that "[e]xcluding those with intellectual disabilities from full adult status risks re-opening the door to the oppression and denial of human dignity justified by their infantilization in the not-so-distant past"); Nicole Ditchman, Kristin Kosluk, Eun-Jeong Lee & Nev Jones, *How Stigma Affects the Lives of People with Intellectual Disabilities: An Overview*, *in* INTELLECTUAL DISABILITY AND STIGMA 31, 39 (Katrina Scior & Shirli Werner eds., 2016) ("Paternalistic attitudes and the infantilization of adults with intellectual disabilities stop them from being allowed to take risks in their lives and have experiences others take for granted.").

but did not pass, would have extended the tender years exception[82] to hearsay to witnesses with ID or autism.[83] Pennsylvania's current tender years exception applies only to witnesses under the age of sixteen.[84] Although aiming to "protect" residents with ID (as well as autism), the bill openly treated them like children. This proposal joined a long list of conceptually similar statutes. For example, in thirty-two states "the same laws that protect children from physical and sexual abuse are used to protect adults with intellectual disabilities."[85]

Creating an exception specific to adults with ID, rather than extending an exception that applies to children, could "help these adults access the justice system . . . [and] create flexibility in the rules of evidence to ensure both that their stories are heard and that they are respected as a human being."[86] Indeed, at least one scholar has suggested that modeling an ID-specific

> exception on tender years exceptions makes sense, because the reasons that justify states having tender year exceptions also justify an exception in cases of people with intellectual disabilities. For example, both child abuse and abuse of . . . intellectually disabled persons are widespread problems. Further, in both cases, the victim is likely the only witness, and the victim may have trouble remembering facts at trial or may have trouble effectively giving their testimony in court . . . . Also, similarly to child victims, it often takes special techniques to "elicit critical information from victims who have difficulties communicating."[87]

82. Hearsay is a statement that the declarant does not make while testifying at the current trial or hearing and that a party offers in evidence to prove the truth of the matter asserted in the statement. FED. R. EVID. 801(C). The tender years exception to the hearsay rule varies widely from state to state, but many states limit the exception to children under a certain age, which could range from children under ten to children under the age of sixteen. A large majority of states also require that the court find that the child's statement is reliable and provide that the exception only applies if the child either testifies or is unavailable and there is corroborating evidence of the statement. Further, some states limit the exception to trials of specific crimes; while others limit it to prosecutions of certain classes of crimes, generally sexual offenses, abuse, and neglect. Other states have more specific limitations on their tender years hearsay exceptions. Alison G. Geter, *Hearing the Unheard: Crafting a Hearsay Exception for Intellectually Disabled Individuals*, 87 MISS. L.J. 469, 475 (2018).

83. H.B. 2325, 2017–2018 Reg., Leg. Sess. (Pa. 2018). After being considered by the Senate Appropriations and Judiciary Committees, the House Appropriations, Rules, and Judiciary Committees, and being debated on the House Floor, this bill ultimately died. *See Bill Information—History*, PA. GEN. ASSEMBLY, https://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?syear=2017&sind=0&body=H&type=B&bn=2325 [https://perma.cc/N86R-XK5L].

84. 42 Pa. § 5985.1(a). Until recently in Pennsylvania, the exception applied only to child victims or witnesses twelve years of age or younger, but the age limit for the exception to apply was raised to sixteen in 2021. H.B. 156, 2020–2021 Reg. Sess. (Pa. 2021).

85. Shapiro, *supra* note 11. These statutes are not identical, however; "of the states that do have a hearsay exception for some class of vulnerable adults, there is little uniformity in the rules." Geter, *supra* note 82, at 488–89.

86. Geter, *supra* note 82, at 491.

87. *Id.* (quoting Mike Hatch, *Great Expectations—Flawed Implementation: The Dilemma Surrounding Vulnerable Adult Protection*, 29 WM. MITCHELL L. REV. 9, 18 (2002)).

To protect the autonomy and personhood of adults with ID, however, it is crucial that states "avoid the temptation to include the exception for intellectually disabled adults within an existing tender years exception."[88]

Extending a children's rule to adults with ID perpetuates the systematic oppression of people with cognitive impairments.[89] It is a prime example of the notion that "when too much weight is put on these adults' similarities with children, their unique characteristics and needs tend to be swept under the rug."[90] It also embraces the medical model of disability,[91] which mainly locates the "problem" of disability within the person "in terms of [their] physical limitations or psychological losses."[92] Such framing "contribute[s] to legitimizing a certain authoritative view that conceptualizes people with disabilities as vulnerable"[93] while simultaneously constructing them as less credible.[94]

The conflation of adults with ID with children is particularly problematic in the sexual abuse context. Framing adults with ID as "like children" implies that they are incapable of legally consenting to sex. This conflation doubles down on "a historical tradition of criminalizing the sexuality of people with mental disabilities,"[95] which continues to this day. As Professors Julia Wacker, Susan Parish, and Rebecca Macy note, "[o]vertly or not, U.S. sexual assault statutes criminalize the sexual activity of people with disabilities[, r]endering the consent of individuals with disabilities meaningless, [and thereby] . . . usher[ing] eugenics in through the back door."[96] This enduring legacy of ableist and paternalist beliefs and practices is one of the reasons that "[n]o group faces the same sort of sexual and reproductive restrictions as are faced by persons with disabilities."[97] Legislation like that proposed in Pennsylvania strips away sexual rights and impinges on reproductive and parenting rights, all of which are grounded in the right to personal integrity.[98]

Even worse, if the extension of the tender years hearsay exceptions to those with ID were to be enacted, it would likely have these deleterious effects without even decreasing sexual assault rates. Research has consistently found that "depriving the rights of women with disabilities does nothing to protect them from

88. *Id.* at 490.
89. Wacker et al., *supra* note 38, at 86.
90. Geter, *supra* note 82, at 492.
91. This model "defines disability in terms of individual deficit." Tom Shakespeare, *The Social Model of Disability*, *in* THE DISABILITY STUDIES READER 267 (Lennard J. Davis ed., 2010). It is contrasted with the "social model," which "defines disability as a social creation—a relationship between people with impairment and a disabling society." *Id.*
92. Camilla Lundberg & Eva Simonsen, *Disability in Court: Intersectionality and Rule of Law*, 17 SCANDINAVIAN J. OF DISABILITY RSCH. 7, 13–14 (2015).
93. *Id.*
94. *Id.* at 14.
95. Wacker et al., *supra* note 38, at 91.
96. *Id.*
97. PERLIN & LYNCH, *supra* note 41, at 9.
98. Powell & Stein, *supra* note 37, at 71.

abuse and may actually serve to perpetuate these crimes."[99] Instead of preventing abuse, what rights-depriving legislation does instead is open the door to other types of abuse. As Professors Robyn M. Powell and Michael Ashley Stein note, such paternalist, sexual-rights-stripping approaches have, "[d]isturbingly, [been used by] some courts [to] justif[y] involuntary sterilization of women and girls with disabilities on the basis that doing so will protect them from sexual abuse and the consequences of abuse."[100]

Another cause for concern is that most of the legislative proposals examined focused on the symptoms rather than the cause of the abuse. Most jurisdictions prioritized reforms that focus on abuser registries or law enforcement and judicial practices.[101] Only California included a provision directly supporting persons with ID, by requiring law enforcement to provide appropriate victim services.[102] Although registry and procedural reforms have the potential to be useful, a narrow focus on institutional abuses and practices is inadequate. Such a narrow approach tackles only a visible symptom—the high rates of sexual abuse among women and girls with ID—rather than the much greater problem, which is marginalization.

One of the key reasons that sexual abuse of women and girls with ID goes largely unpunished is that reporting rates are "exceptionally low."[103] But the examined proposals do little to combat the multiple causes of underreporting. In fact, Arizona's staff and family training provision is the only proposal that addresses this problem,[104] and that proposal is problematic and insufficient. It recognizes the need for more reporting but is unlikely to be effective because it fails to address the reality that sexual abuse is often unaccompanied by physical symptoms and is often committed by caregivers—the very people the proposal tasks with reporting.[105]

Victim underreporting is often a result of victims' lack of knowledge, their dependency, or a combination thereof, all of which contribute to the marginalization of women and girls with ID. First, people with ID might not know that what happened to them is illegal, that they have a right to say no, or that they can report their assault.[106] Moreover, this lack of knowledge can be complicated by a lack of education about assertiveness or sexuality.[107] Second, dependency can also make reporting a challenge, as a victim dependent on their abuser can be more easily coerced into remaining quiet and may have nowhere to turn if they report

99. *Id.* at 64.
100. *Id.* at 63.
101. *See* Appendix, Table 2.
102. A.B. 2359, 2017–2018 Reg. Sess. (Cal. 2018).
103. Wacker et al., *supra* note 38, at 88.
104. *See supra* notes 58–64 and accompanying text.
105. *See supra* notes 58–68 and accompanying text.
106. Leigh Ann Davis, *People with Intellectual Disability and Sexual Violence*, THE ARC (Aug. 2009), https://www.thearc.org/what-we-do/resources/fact-sheets/sexual-violence [https://perma.cc/D49W-4AA5].
107. *Id.*

their abuser.[108] Material dependence and socio-economic control can prevent a person from leaving or reporting an abusive situation.[109] As persons with disabilities, women, and in particular, women with disabilities, experience higher incidences of poverty and unemployment, they are also put at particular risk of facing dependency-related vulnerabilities.[110] Thus, a major flaw with the analyzed legislative proposals is that they did little to challenge the marginalization that makes women with ID vulnerable to sexual abuse. This marginalization also prevents women with ID from reporting their abuse—and without reports of abuse, the registries and legal strategies proposed will create little change.

IV. BEYOND RECENT LEGISLATION: WAYS FORWARD

Activists from the ID community have begun to build on the #MeToo momentum in order to make progress on addressing the rate of sexual assault amongst people with ID,[111] mindful that public attention will inevitably wane.[112] In Arizona this short attention span is arguably already visible. In late 2020, "Dana Kennedy, state director for AARP Arizona and a task force member, said that improving safety for those with developmental disabilities [wa]s not a high priority for lawmakers in the [then-]upcoming 2021 legislative session."[113] Outside the legislative context, the decreasing prioritization of this issue is also arguably visible. Although Arizona Governor Ducey quickly created the Governor's Abuse and Neglect Prevention Task Force following the Hacienda HealthCare assault, and the task force delivered its recommendations within a year of being created, "only a third of the 30 recommendations ha[d] been fully enacted, with others months or years from completion," by the end of 2020.[114] Yet, despite these setbacks, there are indications that advocacy efforts by persons with ID and

108. For women with both ID and physical disabilities, this can be an acute problem as shelters are frequently physically inaccessible. Nancy P. Swedlund & Margaret A. Nosek, *An Exploratory Study on the Work of Independent Living Centers to Address Abuse of Women with Disabilities*, 66 J. REHAB. 57, 61 (2000).

109. Jennifer M. Mays, *Feminist Disability Theory: Domestic Violence Against Women with a Disability*, 21 DISABILITY & SOC'Y 147, 153 (2006). As "[a] disabled person is not only disabled, but also has a gender, class position, ethnicity, age and sexual orientation," this is far from an exhaustive list of the ways that ability/disability and intersectional identities shape experiences of sexual abuse. Lundberg & Simonsen, *supra* note 92, at 9. More in-depth analyses of disability and intersectionality are beyond the scope of this paper, but analyses that center race, age, and other axes of oppression would be productive areas of future research and would allow for more nuanced policy evaluations.

110. *See* Sarah Kim, *Why No One Talks About the High Unemployment Rate Among Women with Disabilities*, FORBES (Feb. 20, 2019), https://www.forbes.com/sites/sarahkim/2019/02/20/women-with-disabilities-unemployment/#4af45f7258a1 [https://perma.cc/N9PG-P2BF].

111. For instance, in June 2018, the Arc of New Jersey hosted a Leadership Summit, resulting in the publication of a white paper that explicitly centers their awareness-raising strategy around "[b]uilding on the powerful voices that have emerged following the #MeToo and Time's Up movements." THE ARC OF N.J., *supra* note 63, at 3.

112. Silverman, *supra* note 45.

113. Silverman, *supra* note 3.

114. *Id.*

their supporters have nevertheless been paying off. Disability rights activists were instrumental in shaping Arizona's recent legislative proposals,[115] and California's proposal also reflects disability rights activists' demands for better victim services.[116]

Otherwise however, the legislation examined in this Article largely ignored the voices and interests of people with disabilities, and it failed to fully incorporate best practices advocated by researchers and the ID community. While "[r]esearch evaluating strategies for preventing the sexual abuse of people with developmental disabilities is scarce,"[117] some useful, evidence-based suggestions have emerged that echo calls from the ID community. Legislators should incorporate these suggestions into current and future reform proposals in order to improve outcomes, and in particular should be mindful to adopt a "nothing about us without us" ethos to respect the voices of those the legislation impacts.[118]

A. Addressing High Rates of Abuse via Practices and Services that Empower, Rather than Infantilize, Survivors

In order to create practices that protect and empower victims with ID and avoid infantilizing this group, activists and researchers have suggested a series of reforms to the systems that deal with the sexual abuse of persons with ID. Currently, "[m]ost states' sexual assault legislation pertaining to adults with cognitive disabilities fundamentally transforms the objective of the trial from assessing if the assault occurred to determining the victim's capacity to consent."[119] As a result, Professors Wacker, Parish, and Macy have proposed three reforms that would take the focus off the victim with ID and instead place it on the crime and the perpetrator. First, sexual assault legislation pertaining to adults with cognitive disabilities should focus on whether the assault occurred rather than on the victim and their impairment. Second, rape shield laws should be applied the same way to disabled and non-disabled persons. And third, statutes should focus on the perpetrator, not the victim with ID.[120] All three changes would be revolutionary for women with ID; they would reform this problematic legislation, and trials about the sexual assaults of these women would not disempower them by magnifying impairments or reifying their supposedly "exotic nature" as

115. Silverman, *supra* note 45.
116. The California legislation was sponsored by the Arc and United Cerebral Palsy California Collaboration, which thanked the legislature for supporting the measures proposed in the bill. *Bill Analysis: Hearing on AB-2359 Sexual Assault Crimes Against Disabled and Developmentally Disabled Victims Before Assembly Comm. on Pub. Safety*, 2017–2018 Reg. Sess. (Cal. 2018).
117. Mahoney & Poling, *supra* note 30, at 372.
118. *See generally* JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT 3 (2000) (discussing the importance of ensuring the representation of disabled people in policy-making decisions, captured by the disability rights slogan "nothing about us without us").
119. Wacker et al., *supra* note 38, at 88.
120. *Id.* at 88–91.

victims.[121]

These suggestions would all be relatively easy to incorporate into current statutes or new proposals and, unlike Pennsylvania's paternalistic proposal, would undermine rather than reinforce "a medical disability model that portrays individuals with impairments as deficient."[122] Adopting these measures could also encourage women with ID to report their assaults. Such measures would challenge false narratives perpetuated by laws that make consent more at issue for victims with ID than for others and that "make it difficult for disabled women to feel like they can come forward and report."[123] By empowering victims to report, these changes could, in conjunction with effective prosecution strategies, lower sexual assault rates while simultaneously respecting and recognizing the status of persons with ID as rights holders.

Other activists have also suggested creating a

> pilot project within a select county/counties to have a court designated to handle cases involving crime victims with disabilities. An option could be the creation of a statewide Disability Response Team (DRT) made up of a multidisciplinary group including court staff, prosecutors, victim-witness service providers, sexual assault program providers etc., which could be deployed to the county to assist in individual cases, provide referral information to appropriate agencies in each county and conduct training.[124]

Such reforms of the criminal legal system would ensure disability-informed practices that would both protect and empower victims with ID.

Advocates have also argued for increased access to post-victimization crisis counseling and therapy. Currently, "[i]ndividuals with developmental disabilities who experience sexual abuse are less likely to receive victim services and other supports than individuals without disabilities."[125] A key challenge in this area is not just providing counseling and victim services but ensuring that appropriate counseling and victim services are available and accessible. Ohio is exemplary of this problem. The state has only twenty-five rape crisis centers to serve thirty-two counties.[126] Moreover, many persons with ID who are victims of sexual abuse are not even sent to these centers. Rather, they are sent to one of the state's twenty-five child advocacy centers, "some of which include individuals with developmental disabilities in their services."[127] However, as Disability Rights Ohio points out, "most of these facilities are not trained in appropriate techniques

121. *Id.* at 90.
122. Felipe Jaramillo Ruiz, *The Committee on the Rights of Persons with Disabilities and Its Take on Sexuality*, 25 REPROD. HEALTH MATTERS 92, 93 (2017).
123. Brownworth, *supra* note 66.
124. THE ARC OF N.J., *supra* note 63, at 5.
125. DISABILITY RTS. OHIO, SEXUAL ABUSE OF INDIVIDUALS WITH DEVELOPMENTAL DISABILITIES: ANALYSIS AND RECOMMENDATIONS FOR OHIO 12 (2015).
126. This figure is based on 2015 data. *Id.*
127. *Id.*

for victims with developmental disabilities, and child-focused services are not appropriate for adults with disabilities."[128]

California's proposed bill reflects an awareness among some legislators that this lack of adequate facilities is a problem. The bill stipulated that funding for victim support go to organizations that provide "services, counseling, or both, to victims of sexual assault crimes involving victims with disabilities and victims who are developmentally disabled in order to ensure that victims receive appropriate services."[129] However, it is not clear that this language would prevent persons with ID from being directed to child services centers for treatment. Rather, the bill's text did not explicitly exclude California child advocacy centers that, like those in Ohio, include individuals with ID in their programs. That child advocacy centers might be included is a realistic possibility because California already uses child services organizations to address incidents of sexual assault among adults with ID and developmental disabilities.[130]

Some suggestions for reform have centered around reducing specific risk factors for people with ID. Activists have, for instance, identified the lack of safe transportation alternatives for persons with ID as a factor that increases their risk of experiencing sexual abuse. Such arguments have noted the "alarming number of allegations of sexual abuse by drivers" working for private providers, and that persons with ID are particularly vulnerable while traveling alone with a driver.[131] Suggested solutions to this problem include "requiring surveillance cameras in vans and in programs for people with I/DD [intellectual and developmental disabilities], and/or increasing staffing ratios or adding aides in programs serving individuals with I/DD (including transportation)."[132]

Proposals intended to interrupt would-be abusers via increased surveillance, increased prosecutions, and the provision of more appropriate post-abuse victim services are promising. But they still mainly target the symptoms, rather than a primary cause, of heightened rates of sexual abuse of women and girls with ID. What is needed to tackle this cause, and to more effectively prevent assault, are broad efforts to challenge the marginalization of disabled persons, especially women and girls with ID. As sexual rights—including both the right to be free from violence and the right to sexuality—are "woefully (perhaps 'tragically' is the

128. *Id.*

129. A.B. 2359, 2017–2018 Reg. Sess. (Cal. 2018).

130. For example, when speaking with a reporter, a representative of the Fremont Police Department described a single "protocol for working with a minor *or a victim with a developmental disability* when they are investigating a sexual assault allegation." Justine Calma, *Is California Failing Its Most Vulnerable Adults?*, FIVETHIRTYEIGHT (Dec. 11, 2018), https://fivethirtyeight.com/features/is-california-failing-its-most-vulnerable-adults/ [https://perma.cc/ERV8-SU5X] (emphasis added). When trying to get information from victimized children or developmentally disabled adults, "the department works with the Child Abuse Listening Interviewing and Coordination Center in Alameda County, which aims to provide a comfortable space for minors or other victims of abuse *to tell a child interview specialist* one-on-one what happened." *Id.* (emphasis added).

131. DISABILITY RTS. OHIO, *supra* note 125, at 6.

132. THE ARC OF N.J., *supra* note 63, at 6.

right word) under[-]considered area[s] of law and social policy,"[133] there is plenty of room for progress.

B. Addressing Marginalization to Prevent Abuse

Activists recommend dismantling systems that further marginalize members of the ID community, and which keep people with ID dependent on others and undereducated about sexual health and autonomy. In an effort to challenge social and economic marginalization, some advocates have proposed programs that focus on increasing employment. Employment would usefully address dependence, which is a core reason that women with ID are at a heightened risk of sexual abuse and find it so challenging to report abuse when it occurs. Data indicate unemployment increases the vulnerability of women with ID and potentially prevents them from being able to break the cycle of violence they experience.[134] Yet, persons with ID remain massively underemployed. According to the American Community Survey, fewer than 25 percent of adults with cognitive disabilities are employed.[135] Although this underemployment has been recognized as a priority by state and federal governments,[136] and as a focus of ID rights advocates and self-advocacy organizations,[137] employment figures have barely changed in recent years.[138] As dependency is so closely related to the high levels of sexual abuse of women and girls with ID, the ultimate success of policies addressing sexual abuse would likely be improved if strategies to mitigate underemployment were simultaneously undertaken.

Advocates have also proposed sexual education as a way both to redress the current effects of marginalization and to reduce the future marginalization of people with ID by supporting their autonomy in the context of sexual expression. While important for everyone, sexual education for persons with disabilities is particularly critical because "[t]he invisibility and oppression of disabled people's sexual lives in public spaces contributes to disabled young people's low levels of sexual knowledge and inadequate sex education compared to their non-disabled

133. PERLIN & LYNCH, *supra* note 41, at 9.

134. Diane L. Smith & David R. Strauser, *Examining the Impact of Physical and Sexual Abuse on the Employment of Women with Disabilities in the United States: An Exploratory Analysis*, 30 DISABILITY & REHAB. 1039, 1039 (2008).

135. Gary N. Siperstein, Robin C. Parker & Max Drascher, *National Snapshot of Adults with Intellectual Disabilities in the Labor Force*, 39 J. VOCATIONAL REHAB. 157, 158 (2013).

136. For example, New York City has taken a multi-prong approach to this issue; for an in-depth analysis of the city's efforts to increase the employment rate of persons with disabilities living within the city, see Holly Jeanine Boux and Michael Ashley Stein, *Accessing Employment and Transportation: The Role of The New York City Mayor's Office for People With Disabilities*, 47 FORDHAM URB. L.J. 1257 (2020).

137. *See, e.g.*, *RRTC Employment (Rehabilitation Research and Training Center on Advancing Employment for Individuals with Intellectual and Developmental Disabilities)*, SELF ADVOCS. BECOMING EMPOWERED, https://www.sabeusa.org/projects/rrtc-employment-project/ [https://perma.cc/98RB-WSE3].

138. Siperstein et al., *supra* note 135, at 158.

peers."[139] This inadequate education intersects with other forms of marginalization to make people with ID particularly vulnerable to sexual abuse.[140] Research indicates, however, that the receipt of sex education that promotes refusal skills is a protective factor against sexual assault.[141] As such, this strategy could have a dramatic effect on reporting rates and on prevention as well. Further, the provision of sexual education to those with ID can help counter "[t]he negative messages relating to disabled people as sexual beings in popular culture [which] inevitably shapes both public attitudes and disabled people's own understandings of their potential to be sexual beings and engage in romantic relationships."[142] Thus, providing adequate sexual education to persons with ID would empower them to have greater access to sexuality and relationships—both of which are human rights.[143]

Some state legislators have likewise recognized the importance of sex education to preventing sexual abuse and assault, but their efforts do not go far enough to adequately address the problem of sexual abuse against persons with ID. As Professors Wacker, Parish, and Macy argue, "improved sexual education for people with cognitive impairments represents just one of several necessary interventions to address the problematic intersection of sexuality and disability in laws, policies, and services."[144] Indeed, some states have introduced legislation that tries to use sexual education to reduce sexual abuse. For example, two bills in Minnesota proposed using instruction on consent and bodily safety to reduce sexual assault rates. One bill proposed such instruction for all students in grades eight through twelve,[145] and the other required it for kindergarten through grade twelve.[146] Problematically, however, neither required that students with ID (or disabilities more generally) receive this training. During the 2015–2016 school year, only 17 percent of students with ID participated in general education classes

139. Sonali Shah, *"Disabled People Are Sexual Citizens Too": Supporting Sexual Identity, Well-being, and Safety for Disabled Young People*, 2 FRONTIERS EDUC. 1, 2 (2017).

140. *Id.*

141. This research also indicates that abstinence-only education does not have this protective effect. John S. Santelli, Stephanie A. Grilo, Tse-Hwei Choo, Gloria Diaz, Kate Walsh, Melanie Wall, Jennifer S. Hirsch, Patrick A. Wilson, Louisa Gilbert, Shamus Khan & Claude A. Mellins, *Does Sex Education Before College Protect Students from Sexual Assault in College?*, 13 PLOS ONE 1, 14 (2018).

142. Shah, *supra* note 139, at 3.

143. *Id.* at 2.

144. Wacker et al., *supra* note 38, at 92.

145. H. F. 250, 91st Leg., 2019–2020 Sess. (Minn. 2019). This bill was not passed into law before the end of the 91st Legislature. *See HF 250: Status in the House for the 91st Legislature*, OFF. OF THE REVISOR OF STATUTES, https://www.revisor.mn.gov/bills/bill.php?view=chrono&f=HF0250&y=2019&ssn=0&b=house#actions [https://perma.cc/7Y6G-QV52].

146. H. F. 802, 91st Leg., 2019–2020 Sess. (Minn. 2019) ("Erin's Law"). This bill was ultimately passed into law. MINN. STAT. § 120B.234 (2020). A version of this law has been adopted in a number of other states as well; as of January 2022, it had been passed in 37 states. *See* ERIN'S LAW, www.erinslaw.org [https://perma.cc/5PD4-NTAK].

with peers without disabilities at least 80 percent of the time,[147] and, in some states, students in special education classes are automatically opted out of health and sex education classes.[148] As such, it is likely that many students with ID will not receive this important sexual education as it is not specifically required by law.

Responding to education systems' failures on this issue, persons with ID have both proposed legislative amendments to include students with ID and organized grassroots efforts to provide peer-led instruction. First, advocates have proposed amendments to state sex-ed laws that would require students in special education to be "automatically included in health/sex education classes with the provision to opt out as appropriate. In the event that an opt out option is exercised, the student's Individual Education Plan [would] need[] to address other ways that healthy sexuality will be addressed with the student."[149] Second—and, perhaps unsurprisingly, given that surveys of adults with ID have found that, by a wide majority, they want to talk and learn about sexuality more frequently[150]—people with ID have filled the gap through peer-to-peer education and training modules, some of which predate #MeToo. For instance, since 2012, Self Advocates Becoming Empowered has had a publicly available webinar discussing sexuality for individuals with autism and developmental disabilities. The webinar focuses on consent and refusal skills and healthy relationships, and it frames sexuality as "positive and pleasurable" and sexual autonomy as an issue of rights. The webinar notes "[t]he fundamental principles of self-advocacy[—]that people with developmental disabilities can have control over their own lives, make their own decisions, solve problems and speak for themselves[—]extend to sexuality and relationships."[151] Such efforts could reach far more people if they had state support and if legislation required persons with ID to have appropriate sexual education, like their peers.

C. Empowering and Supporting Decision-Making of Persons with ID

Evidence about the impact of sexual education shows that it does more than just increase knowledge about sexuality; it also increases decision-making capacity.[152] Thus, discussions about how to reduce sexual abuse of persons with

147. NAT'L COUNCIL ON DISABILITY, IDEA SERIES: THE SEGREGATION OF STUDENTS WITH DISABILITIES 24 (2019).

148. THE ARC OF N.J., *supra* note 63, at 5.

149. *Id.*

150. For instance, one study found that 89.4% of adults with ID (who were interviewed during the researchers' survey on sexuality in adults with ID) supported more frequent discussions about sexuality. M.D. Gil-Llario, V. Morell-Mengual, R. Ballester-Arnal & I. Diaz-Rodriguez, *The Experience of Sexuality in Adults with Intellectual Disability*, 62 J. INTELL. DISABILITY RSCH. 72, 76 (2018).

151. KATHERINE MCLAUGHLIN & SABE, SEX & RELATIONSHIPS: HOW DO I FIGURE THIS OUT? (Aug. 7, 2012), https://www.scribd.com/document/102876704/Self-Advocates-Becoming-Empowered-Webinar-with-Autism-NOW-August-7-2012 [https://perma.cc/4EDD-S5WF].

152. Individualized, one-on-one educational interventions that match the educational approach to

ID unavoidably implicate ongoing debates about decision-making. These debates largely center on two models of decision-making for people with cognitive disabilities, including ID: surrogate decision-making, which "removes a person's authority over their own lives and vests this authority in another,"[153] and supported decision-making, which foregrounds an interdependent expression of personal autonomy.[154]

A full analysis of the voluminous literature surrounding surrogate versus supported decision-making is beyond the scope of this paper. Nevertheless, given the centrality of decision-making to the issues at hand, including sexuality, sexual abuse, marginalization, and autonomy, this Article concludes by highlighting the pitfalls of the surrogate decision-making model in the context of sexual abuse, namely, that it perpetuates marginalization and systematic oppression of those with ID. This section then turns to the potential benefits of a supported decision-making model, whereby "an individual makes decisions with the support of trusted individuals."[155]

1. Traditional Models of Decision-Making: Surrogate Decision-Making and Guardianship

Surrogate decision-making models, including guardianship, "substitute as decision maker another individual (the guardian [or other surrogate decision-maker]) for the individual in question" (here, the person with ID).[156] This relocation of decision-making authority can impact how a court interprets a victim's capacity and autonomy to make decisions. As a model of decision-making, guardianship "locates decision making in the surrogate or guardian and not in the individual being assisted."[157] As scholars have noted, there are problems with substitute or surrogate decision-making for those with ID, particularly in the

the learning style, skills, and abilities of individual learners with ID result in improved decision-making around sexuality. Eileen Dukes & Brian E. Maguire, *Capacity to Make Sexuality-Related Decisions*, 53 J. INTELL. DISABILITY RSCH. 727, 732–33 (2009). Here, researchers focused specifically on persons with "moderate" ID, noting that work to evaluate whether these findings are representative of those with more significant ID is still being done. *Id.*

153. MICHAEL BACH & LANA KERZNER, A NEW PARADIGM FOR PROTECTING AUTONOMY AND THE RIGHT TO LEGAL CAPACITY 7 (The Law Commission of Ontario 2010).

154. *See* Anna Arstein-Kerslake, Joanne Watson, Michelle Browning, Jonathan Martinis & Peter Blanck, *Future Direction in Supported Decision Making*, 37 DISABILITY STUD. Q. (2017). It is important to note that these models do not only apply to those with ID; they are applicable to decision-making in the context of many types of cognitive disability. *See id.* ("The core of supported decision-making is that people with cognitive disability have access to assistance for decision-making to enable participation in society on an equal basis."). Moreover, this dichotomy is a distillation of a nuanced debate, and there is appreciable variability within these two models. A more detailed discussion of such nuance is beyond this Article's scope.

155. AM. BAR. ASS'N. COMM'N ON LAW & AGING, SUPPORTING DECISION MAKING ACROSS THE AGE SPECTRUM 1 (2020).

156. Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, 19 HUM. RTS. BRIEF 8, 9 (2012).

157. *Id.*

area of sexuality. A key issue is that decision-making capacity regarding sexuality is variable and responsive to education.[158] Thus, a court's conclusion that an individual with ID does not have the capacity to make sexuality-based choices may be based not on that individual's "capacity" per se, but on their lack of education about the topic. Further, this "lack of capacity" could have been caused, and can be maintained, by the guardian's control over access to sexual education.

Indeed, the literature abounds with examples of those with decision-making authority who have failed to make sexuality-related decisions based purely on the interests of the legally incapacitated person. For instance, when Professor María Dolores Gil-Llario interviewed adults with ID about sexuality, 65 percent of them said that, regardless of their own desires about being in a romantic relationship, "they do not or would not have their parents' permission to have a steady partner. The two reasons they gave for this were 'that's not right' (50.9%) and because 'you can't do that sort of thing' (49.1%)."[159] Expanding sexuality-related decision-making authority beyond parents to other groups—such as health care professionals, for instance—is not likely to fix the problem. Indeed, one study brings the inadequacy of any approach that might empower medical professionals to make such decisions into sharp relief: when surveyed, 41 percent of doctors expressed support for the statement "[s]terilization is a desirable practice for [women] with an intellectual disability,"[160] citing concerns about parenting ability and available support. Such data underscore doctors' lack of desirability as substitute decision-makers. Ultimately, guardianship and other forms of surrogate decision-making can function as a form of gatekeeping, where families and medical staff create a "culture of disablement."[161] For many people with ID, such a culture makes accessing their rights to sexuality either challenging or impossible.[162]

Beyond disempowering the individual, the impact of this "culture of disablement" extends beyond the person specifically under guardianship and

158. Dukes & Maguire, *supra* note 152, at 732–33.

159. In total, 180 men and 180 women (19–55 years old) were interviewed. Gil-Llario et al., *supra* note 150, at 75.

160. Gilmore and Malcolm found that their survey of Australian doctors reflected the gendered nature of this problem. Linda Gilmore & Laura Malcolm, *'Best for Everyone Concerned' or 'Only as a Last Resort'? Views of Australian Doctors about Sterilization of Men and Women with Intellectual Disability*, 39 J. INTELL. & DEVELOPMENTAL DISABILITY 177, 179, 183–84 (2014). Of the doctors surveyed, 23 percent supported sterilization when asked the same question about men with ID, and these doctors viewed a number of factors as reasonable grounds for the sterilization of women—but not men—including vulnerability to sexual abuse. *Id.* It is worth mentioning that the researchers found these figures were "surprising" given "the fact that Australian legislation require[d] requests for surgical sterilization to be approved by the Family Court of Australia or state-based Guardianship Tribunals," and, further, that the legislation states that the practice is not desirable except in very exceptional circumstances. *Id.*

161. Natasha Alexander & Miriam Taylor Gomez, *Pleasure, Sex, Prohibition, Intellectual Disability, and Dangerous Ideas*, 25 REPROD. HEALTH MATTERS 114, 117 (2017).

162. *Id.*

contributes to a broader social climate of paternalism.[163] As noted above, this ambient paternalism heightens the risk of sexual assault for women with ID. Activists argue that "[t]he overarching focus [of programs challenging sexual abuse of persons with ID] should be on changing cultural norms around sexuality, encouraging and promoting healthy sexuality in all its forms,"[164] and "empowering people with I/DD to be leaders in this movement."[165] Guardianship and substituted decision-making, however, do the opposite. Both legally disempower individuals with ID and increase their dependence on, and vulnerability to, those who might target them for assault.

2. Embracing a New Paradigm: Self-determination and Supported Decision-Making

"Individuals with ID have the right to be as self-determined as possible in making choices about their own sexuality,"[166] and supported decision-making is one useful paradigm to move towards realizing such self-determination.[167] The concept of supported decision-making is entrenched in international law and emergent in U.S. state policies, and it contrasts sharply with traditional "substituted decision-making" models.[168]

In international law, the supported decision-making paradigm is used in the United Nations Convention on the Rights of Persons with Disabilities (CRPD). Article 12 of the CRPD mandates that "States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life."[169] Scholars have interpreted this mandate to include "not simply the capacity to have rights (or passive capacity) but also the capacity to act or exercise one's rights."[170] In particular, Article 12(3)'s requirement that "States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity"[171] promotes supported, rather than substituted, decision-making. The language of support is significant and intentional; "this use of the word 'support,' and the related concept of supported decision making, represents nothing less than a 'paradigm shift' away from well-

163. *See* Lydia X. Z. Brown, *Disability in an Ableist World*, AUTISTIC HOYA (Aug. 12, 2012), https://www.autistichoya.com/2012/08/disability-in-ableist-world.html [https://perma.cc/J2E8-6BWN] (observing paternalism's popularity "in our society.").
164. THE ARC OF N.J., *supra* note 63, at 3.
165. *Id.*
166. Gilmore & Malcolm, *supra* note 160, at 185.
167. *Id.*
168. *See generally* PIERS GOODING, A NEW ERA FOR MENTAL HEALTH LAW AND POLICY: SUPPORTED DECISION-MAKING AND THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES 117–217 (2018) (contrasting "substituted" and "supported" decision-making paradigms).
169. Convention on the Rights of Persons with Disabilities, adopted Dec. 13, 2006, G.A. Res. 61/106, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/106 (2006) (entered into force May 3, 2008) ("CRPD").
170. Dinerstein, *supra* note 156, at 8.
171. G.A. Res. 61/106, *supra* note 169.

established but increasingly discredited notions of substituted decision making."[172] Professor Roger D. Dinerstein provides a useful explanation of the paradigm embraced in Article 12, observing that supported decision-making

> retains the individual as the primary decision maker, while recognizing that the individual with a disability may need some assistance—and perhaps a great deal of it—in making and communicating a decision. The paradigm shift reflected in the move from substitute to supported decision making aims to retain the individual as the primary decision maker but recognizes that an individual's autonomy can be expressed in multiple ways, and that autonomy itself need not be inconsistent with having individuals in one's life to provide support, guidance and assistance to a greater or lesser degree, so long as it is at the individual's choosing.[173]

The supported decision-making paradigm therefore better realizes both an individual's right to self-determination and the utility of being able to access help by not sacrificing either.

A full consideration of these decision-making models and how they could be included as part of empowerment-minded legislation is beyond the current analysis. Nevertheless—and as has been suggested by many advocates—legislators should consider reforming guardianship laws and practices and evaluating the utility of supported decision-making policies alongside the other legal and policy reforms discussed herein. Notably, supported decision-making is not only theoretically instructive but is gaining traction as a policy alternative in the U.S.[174] An important stride forward occurred in Virginia in 2013, when "Margaret 'Jenny' Hatch won a year-long legal battle protecting her right to make her own life decisions using supported decision-making, instead of being subjected to a permanent, plenary guardianship."[175] Alongside such victories, supported decision-making has also begun to gain legislative traction in state houses across the country; several states have passed supported decision-making agreement laws in the past several years.[176] This innovation has not been confined to the states; "[t]he *Uniform Guardianship, Conservatorship and Other Protective Arrangements Act* (UGCOPPA) [alongside] a growing number of state

172. Dinerstein, *supra* note 156, at 8.
173. *Id.* at 10.
174. Arstein-Kerslake et al., *supra* note 154 (observing that although support for this practice is not new, supported decision-making "has begun to make strides in the United States.").
175. *Id.* (citing Ross and Ross v. Hatch, Circuit Court of Newport News, Virginia, Case No. CWF-120000-426 (2013)).
176. *See* Zachary Allen & Dari Pogach, *More States Pass Supported Decision-Making Agreement Laws*, 41 BIFOCAL 159, 159 (2019). For instance, in 2019, Indiana, North Dakota, Nevada, and Rhode Island passed such laws, *id.*, while Colorado formalized the use and recognition of supported decision-making agreements in 2021, S.B. 21-075, 2021 Reg. Sess. (Colo. 2021), and Louisiana and Washington state did so the year before, H.B. 361, 2020 Reg. Sess. (La. 2020); S.B. 6287, 2020 Reg. Sess. (Wash. 2020). Previously, Alaska, Delaware, the District of Columbia, Texas, and Wisconsin had enacted supported decision-making laws. *See* Allen & Pogach, *supra*, at 159–60.

guardianship laws require courts to consider the viability of alternatives, including decision supports,[177] before appointing a guardian."[178] This trend echoes the ID community's call for empowerment in decision-making and reflects the influence of supported decision-making activists in the United States, the influence of the CRPD—which the United States has signed, but not ratified[179]—and a growing international embrace of the practice.[180]

Given the empowering potential of the supported decision-making model, especially in the context of sexuality, it is encouraging that supported decision-making theory and laws are "gain[ing] momentum"[181] both inside and outside the

177. "Decision supports" are not quite analogous to "supported decision-making." "Decision supports" is a broader concept than "supported decision-making," "encompass[ing] all means of support, from formal practices to informal interactions, and to distinguish the concept from supported decision making." AM. BAR. ASS'N., *supra* note 155, at 1 (2020). Thus, when it comes to embracing supported decision-making, this federal change is more conservative than many innovations emerging from the states.

178. *Id.* at 5–6 (citing UGCOPAA §§ 301(a)(1)(B), 102(13)).

179. UNITED NATIONS—DISABILITY, CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD), https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html [https://perma.cc/9DQS-6HPD]. There is an important difference in the obligations that accompany signing versus ratifying a treaty like CRPD. Ratification is a more robust commitment, and it "defines the international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act." *Glossary*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/Overview.aspx?path=overview/glossary/page1_en.xml [https://perma.cc/8FQ8-CBE3], (citing Vienna Convention on the Law of Treaties arts. 2(1)(b), 14(1) & 16, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331). Unlike ratification, signing, when—as here—the signature is subject to ratification, acceptance or approval, "does not establish the consent to be bound" but does "create[] an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty." *Id.* (citing Vienna Convention on the Law of Treaties arts. 10 & 18, *supra*).

180. *See, e.g.*, Laurie Graham, Augmentative Communication Community Partnerships Canada, *Summary* (2014) (summarizing BACH & KERZNER, *supra* note 153, at 2), http://visiondesigngroup.ca/justice/wp-content/uploads/2014/02/Article-Summary-Bach.pdf [https://perma.cc/NX7F-4C92] ("illustrat[ing, *inter alia*,] recent inroads in Canadian provincial law towards 'supported decision making' (encouraging people with disabilities to appoint people to help them make decisions)"); AM. BAR. ASS'N., *supra* note 155, at 3–4 (2020) ("The CRPD Article 12's principles have served as a more recent starting point for materials on decision supports around the world, including a core set of values contained in a policy development guideline for aged care, published in Australia, based on the principles in the [CRPD]. . . . The core values in the Australian guidelines are directly in alignment with Article 12 of the CRPD."). *But see* Sarah Buhagiar & Claire Azzopardi Lane, *Freedom from Financial Abuse: Persons with Intellectual Disability Discuss Protective Strategies Aimed at Empowerment and Supported Decision-Making*, DISABILITY & SOC'Y 1, 7, 14 (2020) (finding that despite Malta's ratification of the CRPD, the overprotection of persons with ID in Malta is common, and that a "recurring assertion" of those with ID who were surveyed by researchers "was the need to have more control over one's finances and the desire to be able to make independent decisions"); Mehreteab G. Ghebregergs, *Enduring the Compatibility of the Ethiopian Law on Legal Capacity with Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD), in* IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS COMMITMENTS AND THE IMPACT ON ONGOING LEGAL REFORMS IN ETHIOPIA (International Studies in Human Rights, Vol. 131, 2020) (arguing that despite the CRPD's requirements, the Ethiopian framework retains the substituted decision-making model and should move towards a supported decision-making system).

181. Allen & Pogach, *supra* note 176, at 161.

United States. As was noted above, both lack of control over personal affairs and reliance on others for care contribute to the elevated rate of sexual abuse of women with ID.[182] Supported decision-making empowers decision-making *by*—rather than *for*—persons with ID.[183] Indeed, it "mirrors how most adults make daily decisions—whether to get car repairs, sign legal documents, consent to medical procedures, review financial documents, and the like. In each instance, individuals seek advice, input, and information from knowledgeable friends, family, or professionals."[184] Supported decision-making thus directly challenges state and familial paternalism and gives women with ID more control over their personal affairs while decreasing their direct reliance on others. While supported decision-making has been described a "nascent theory and practice,"[185] and scholars and advocates continue to debate its utility even as it is more broadly embraced in practice,[186] the potential liberation and empowerment of supported decision-making models must be foregrounded in any discussion about capacity, dependence, and persons with ID being able to access their sexual rights.

CONCLUSION

Commenting on the CRPD's policies on sexuality, scholar-activist Felipe Jarimillo Ruiz noted they "can be interpreted in a way that is either empowering or protectionist. The overarching emphasis on violence and force indicates that the intention has been to underscore the latter rather than the former."[187] The same can be said of U.S. policies. Even though some emphasis on "violence and force" is necessary to combat sexual abuse, the direction of current legislative proposals indicates protectionism, not empowerment, by overwhelmingly focusing on prosecutorial and law enforcement remedies rather than incorporating and foregrounding strategies to involve and support those with ID. Although many of the proposals included in the bills examined herein could serve as a useful starting point, broader reforms that address not only the remediation of sexual assault statutes but also the root causes of sexual assault are necessary. Such policies should empower women with ID by increasing their access to sexual rights and autonomy, and prioritizing sexual education and employment. The rates of sexual abuse of women with ID are epidemic; "[i]f this were any other population . . . [w]e would be irate and it would be the No. 1 health crisis in this country."[188]

182. W. VA. S.A.F.E., *supra* note 36, at B1.1.

183. Jonathan Martinis & Jessalyn Gustin, *Supported Decision-Making as an Alternative to Overbroad and Undue Guardianship*, 60 ADVOC. 41, 41 (2017) ("Supported decision-making empowers people to make their own decisions and be more self-determined.").

184. *Id.*

185. Jasmine E. Harris, *The Role of Support in Sexual Decision-Making for People with Intellectual and Developmental Disabilities*, 77 OHIO ST. L.J. FURTHERMORE 83, 84 (2016).

186. *Id.*

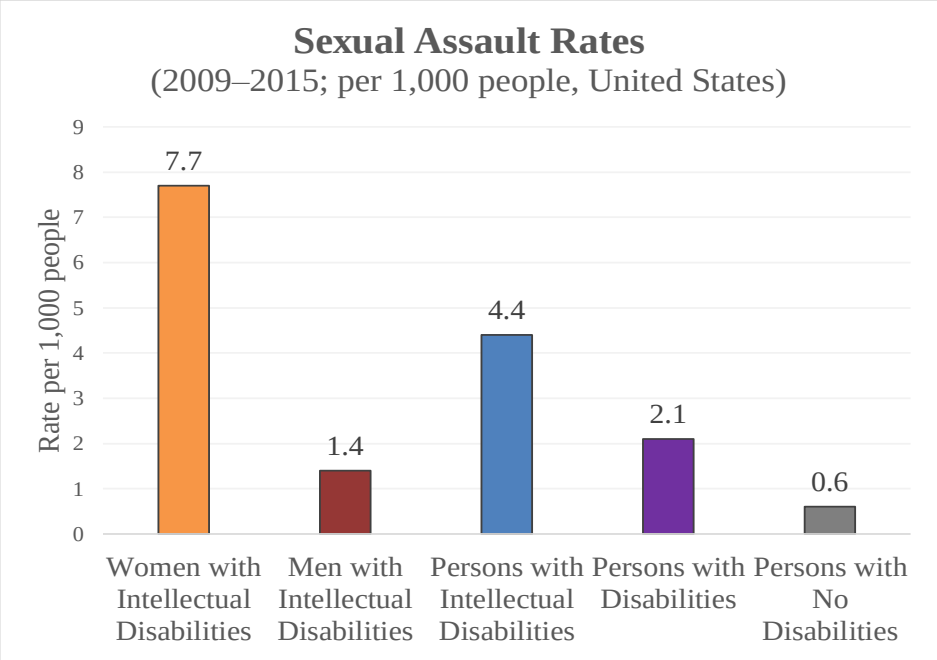
187. Ruiz, *supra* note 122, at 96.

188. Shapiro, *Sexual Assault Epidemic*, *supra* note 11 (quoting Dr. Nancy Thaler, a deputy secretary of Pennsylvania's Department of Human Services who ran the state's developmental disabilities programs).

While legislative efforts to address this issue thus far have been insufficient, activists can, and should, capitalize on #MeToo's enduring momentum to continue to push for change in order to fulfill the movement's goals of not just awareness raising, but of "support[ing] survivors and mov[ing] people to action."[189]

APPENDIX

Chart 1: Sexual Assault Rates, per 1,000 people, 2009–2015 U.S. Department of Justice data[190]



189. Tarana Burke, *#MeToo Founder Tarana Burke on the Rigorous Work That Still Lies Ahead*, VARIETY (Sept. 25, 2018), https://variety.com/2018/biz/features/tarana-burke-metoo-one-year-later-1202954797 [https://perma.cc/956Y-Z7WG].

190. Harrell, *supra* note 25, at 3; Shapiro, *Sexual Assault Epidemic*, *supra* note 11.

Table 1: Selected Recent Bills and Statutes on Disability and Sexual Abuse

Jurisdiction	***Bill info.***	***Stated purpose***	***Main components of bill***
Federal (proposed in 115th & 116th Congresses)	"Certainty, Assistance, and Relief for Everyone Act" (CARE Act) H.R. 505	Amend VAWA to reauthorize grants for education, training, enhanced services to end violence against/ abuse of women with disabilities.	- Adds reporting requirement to Violence Against Women Act (VAWA). - AG must issue report identifying/describing best practices for law enforcement officers and prosecutors in investigating and prosecuting sexual assault cases involving the victimization of individuals with disabilities.[191]
Arizona[192]	H.B. 2665	Amending title 36, chapter 4, Arizona revised statutes, by adding article 12; relating to vulnerable adults.	- Requires state to develop educational curriculum about signs of neglect/abuse, including sexual abuse, for people whose jobs require caring for vulnerable adults. - Education/training must have component for families of vulnerable adults.[193]
	H.B. 2666	Amending sections 46-451 and 46-454, Arizona revised statutes; relating to vulnerable adults.	- Duty to report legislation (makes any "health professional" who has responsibility for care of vulnerable adult a mandatory reporter for abuse, neglect, or exploitation of such an adult). - Failure to report sex offense is Class 6 felony (not Class 1 misdemeanor, as for other abuse/neglect).[194]

191. CARE Act, H.R. 505, 116th Cong. (2019).
192. Several other statutes were proposed during the relevant time frame in the states examined that also address "vulnerable adults" in some way. However, these were not included in this analysis because they only tangentially addressed the issue of sexual abuse of women with ID. For instance, one bill—which has since been signed into law—focused on modifying fingerprint clearance requirements for group homes in the context of a central registry background check. *See, e.g.*, S.B. 1537, 54th Leg., 1st Reg. Sess. (Ariz. 2019).
193. H.B. 2665, 54th Leg., 1st Reg. Sess. (Ariz. 2019); *see* Innes, *supra* note 55.
194. H.B. 2666, 54th Leg., 1st Reg. Sess. (Ariz. 2019); *see* Innes, *supra* note 55.

	S.B. 1211	Emergency measure establishes licensing requirements for intermediate care facilities for individuals with intellectual disabilities (ICF-IID).	- Requires ICF-IIDs to be licensed & certified by Jan. 1, 2020. - Requires employers to conduct Adult Protective Services registry background check for anyone employed/seeking employment in a position with children or vulnerable adults. - Requires prospective employees to certify, prior to employment, allegations of vulnerable adult abuse, neglect or exploitation against them. - Requires development of rules requiring employees/personnel of ICF-IIDs to report abuse, neglect and exploitation.[195]
California	A.B. 2359	An act to add and repeal Article 5 (commencing with Section 13839) of Chapter 4 of Title 6 of Part 4 of the Penal Code, relating to crimes, and making an appropriation therefor.	- Require state Office of Emergency Services (OES) to allocate/award funds to up to 11 district attorney offices that employ vertical prosecution methods for prosecution of sexual assault crimes involving disabled and developmentally disabled victims. - Requires OES on/before 1/1/2022, to submit to Legislature/Governor a report detailing the number and nature of sexual assault prosecutions, convictions, and sentences in counties that received funding. - Appropriates $2,650,000 from the General Fund to OES to finance program. - To ensure that victims receive appropriate services, this bill directs OES to provide funding under this program to district attorney offices that *inter alia* work with at least one advocacy agency that provides services to

195. ARIZ. H.H.S. S. COMM., FACT SHEET FOR S.B. 1211: FOR H.H.S. COMMITTEE (Ariz. 2019), https://azcapitolreports.com/viewhtm.cfm?id=232947 [https://perma.cc/RA9Y-LGUR].

			victims of sexual assault who are physically and/or developmentally disabled.[196]
Massachusetts	S. 71	An Act to protect persons with intellectual or developmental disability from abuse.	- Requires state to establish/maintain registry of care providers against whom substantiated findings of registrable abuse (including sexual) have been made. - Prohibits department of developmental services and employers[197] from hiring or using the services of those on registry. - Failure to meet requirements punishable by $5,000 fine, license revocation/ downgrade, state contract forfeiture. - Mandates annual registry audits for compliance.[198]
Pennsylvania	H.B. 2325	Amending Title 42 of PA Consol. Statutes, in depositions and witnesses, providing procedures to protect victims and witnesses with intellectual disabilities or autism.	- To promote best interests of residents of this Commonwealth with [ID] or autism who are material witnesses or victims of crime," including sexual offenses, this bill extends the "tender years" hearsay exception—which currently only applies to children 12 and under—to crime victims or witnesses with ID/autism.[199] - Allows the out of court statements of crime victims/witnesses with ID/autism to sometimes be admitted without requiring these particular victims/witnesses to take the

196. A.B. 2359, 2017–2018 Reg. Sess. (Cal. 2018).

197. "Employer" is defined as "an entity that provides services or treatment to persons with intellectual or developmental disabilities, pursuant to: (i) a contract or agreement with the department; (ii) funding administered by the department; or (iii) a license under section 15 or 15A of chapter 19B." S. 71, 191st Leg., Reg. Sess. (Mass. 2019) ("An Act to Protect Persons With Intellectual or Developmental Disability From Abuse").

198. *Id.*

199. H.B. 2325, 2017–2018 Reg. Sess. (Pa. 2018) ("Protecting Intellectually Disabled and Autistic Victims").

			stand at trial, in order to "protect" them during their involvement with the criminal justice system.[200]

Table 2: Key Themes in Recent Statutes on Disability and Sexual Abuse

Theme	**Jurisdiction**
Improve law enforcement/judicial practices	1. Federal[201] 2. California[202] 3. Pennsylvania[203]
Establish/reform abuser registries	1. Arizona (license contingent on registry use)[204] 2. Massachusetts[205]
Mandate/alter employee training/duty to report (available to family)	1.Arizona[206]
Improve victim services	1. California[207]

200. State Representative Garth D. Everett, *Everett Legislation to Aid Crime Victims with Intellectual Disabilities, Autism Passes House*, PENNSYLVANIA STATE REPRESENTATIVE GARTH EVERETT (June 12, 2018), http://www.repeverett.com/NewsItem.aspx?NewsID=271015 [https://perma.cc/9PC3-MZVD]; H.B. 2325, 2017-2018 Reg. Sess. (Pa. 2018) ("Protecting Intellectually Disabled and Autistic Victims").
201. CARE Act, H.R. 505, 116th Cong. (2019).
202. A.B. 359, 2017–2018 Reg. Sess. (Cal. 2018).
203. H.B. 2325, 2017–2018 Reg. Sess. (Pa. 2018).
204. S.B. 1211, 54th Leg., 1st Reg. Sess. (Ariz. 2019).
205. S. 71, 191st Leg., Reg. Sess. (Mass. 2019).
206. H.B. 2665, 54th Leg., 1st Reg. Sess. (Ariz. 2019).
207. A.B. 2359, 2017–2018 Reg. Sess. (Cal. 2018).

Applicant Details

First Name	**Justin**
Last Name	**Hill**
Citizenship Status	**U. S. Citizen**
Email Address	**hilljust@umich.edu**
Address	**Address** **Street** **840 Brookwood Pl** **City** **Ann Arbor** **State/Territory** **Michigan** **Zip** **48104** **Country** **United States**
Contact Phone Number	**4153088936**

Applicant Education

BA/BS From	**Indiana University-Bloomington**
Date of BA/BS	**May 2016**
JD/LLB From	**The University of Michigan Law School** **http://www.law.umich.edu/currentstudents/careerservices**
Date of JD/LLB	**May 10, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Michigan Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**1L Oral Advocacy Competition** **Campbell Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Brensike Primus, Eve
ebrensik@umich.edu
734-615-6889
Schlanger, Margo
mschlan@umich.edu
Litman, Leah
lmlitman@umich.edu
Weiss, Sam
sam@rightsbehindbars.org

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Justin Hill
840 Brookwood Pl.
Ann Arbor, MI 48104

May 3, 2022

The Honorable Jane Kelly
U.S. Court of Appeals for the Eighth Circuit
111 Seventh Avenue, SE
Cedar Rapids, IA 52401-2101

Dear Judge Kelly:

I am writing to apply for a clerkship in your chambers for the 2023–24 term. After recently graduating from the University of Michigan Law School, I will spend the next year clerking for Judge Jia M. Cobb in the U.S. District Court for the District of Columbia.

I pursued appellate litigation opportunities at every turn in law school because I love the process of turning complicated issues into clear, concise arguments. During my internships, I helped to write multiple appellate briefs and even contributed to a U.S. Supreme Court petition for certiorari that ultimately resulted in a grant, vacate, and remand order from the Court. I also earned a spot in the final round of Michigan Law's Campbell Moot Court Competition and capped off my law school career by arguing before three federal circuit court judges. I would be honored to contribute my passion and skills to the work of your chambers.

For your review, I included my resume, law school transcript, and writing samples. I also included letters of recommendation from the following people:

- Professor Leah Litman: lmlitman@umich.edu, (734) 647-0549
- Professor Margo Schlanger: mschlan@umich.edu, (202) 277-2506
- Professor Eve Brensike Primus: ebrensik@umich.edu, (734) 615-6889
- Sam Weiss: sam@rightsbehindbars.org, (202) 455-4399

Thank you for your time and consideration.

Respectfully,

Justin Hill

Justin Hill

840 Brookwood Place, Ann Arbor, MI 48104
(415) 308-8936 • hilljust@umich.edu
He/Him/His

EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL — Ann Arbor, MI
Juris Doctor GPA: 3.896 (historically top 5%) — Expected May 2022
Honors: Dean's Scholarship (merit-based)
Activities: *Michigan Law Review*, Articles Editor
Campbell Moot Court, Finalist

INDIANA UNIVERSITY, KELLEY SCHOOL OF BUSINESS — Bloomington, IN
Bachelor of Science in Finance, Business Analytics — May 2016
Honors: IU Excellence Scholarship
Study Abroad: City University, Kowloon Tong, Hong Kong (Jan – May 2015)

EXPERIENCE

HONORABLE JIA M. COBB, U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA — Washington, D.C.
Law Clerk — Aug 2022 – Aug 2023

MARYLAND OFFICE OF THE PUBLIC DEFENDER, APPELLATE DIVISION — Baltimore, MD
Legal Intern — May 2021 – Aug 2021

- Drafted the opening brief for a case before the Maryland Court of Special Appeals by identifying the issues in the record, researching the applicable case law, and crafting the legal arguments.
- Researched a variety of Fourth Amendment issues, including how disproportionate policing affects the "flight from police" factor in the probable cause analysis.

RIGHTS BEHIND BARS — Washington, D.C.
Intern — May – July 2020

- Edited, cite-checked, and performed research in support of federal appellate briefs, including a U.S. Supreme Court certiorari petition that was granted (*Taylor v. Riojas*, No. 19-1261).
- Drafted a portion of a Ninth Circuit brief arguing that the defendant's egregious lack of citations to the record prejudiced our client, resulting in a waiver of those arguments on appeal.

CIVIL RIGHTS LITIGATION CLEARINGHOUSE — Ann Arbor, MI
Project Manager — Sep 2019 – Present

- Research case law and write case summaries for an online database of injunctive civil rights cases viewed by more than 15,000 monthly users.

PWC — San Francisco, CA
Risk Assurance Associate — Aug 2016 – May 2019

- Identified gaps in accounting processes that risked financial misstatements and worked with clients to develop and implement mitigation solutions that complied with Sarbanes-Oxley standards.
- Selected to oversee the design of new accounting controls for a mid-sized microchip manufacturer.

ADDITIONAL

Volunteer: Sentence Commutation Project (2021 – current): Currently working with a client who has served 12 years on a 45-year sentence to develop an application for sentence commutation.

Publications: Professor Eve Brensike Primus and I will co-author an article summarizing the Supreme Court's 2021–22 criminal law cases for Court Review, a journal of the American Judges Association.

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Hill,Justin
Student#: 72626280

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2019	**(September 03, 2019 To December 20, 2019)**							
LAW	510	001	Civil Procedure	Len Niehoff	4.00	4.00	4.00	A
LAW	520	001	Contracts	Daniel Crane	4.00	4.00	4.00	A
LAW	530	001	Criminal Law	Kimberly Thomas	4.00	4.00	4.00	A
LAW	593	003	Legal Practice Skills I	Beth Wilensky	2.00		2.00	S
LAW	598	003	Legal Pract:Writing & Analysis	Beth Wilensky	1.00		1.00	S
Term Total				**GPA: 4.000**	**15.00**	**12.00**	**15.00**	
Cumulative Total				**GPA: 4.000**		**12.00**	**15.00**	
Winter 2020	**(January 15, 2020 To May 07, 2020)**							
During this term, a global pandemic required significant changes to course delivery. All courses used mandatory Pass/Fail grading. Consequently, honors were not awarded for 1L Legal Practice.								
LAW	540	002	Introduction to Constitutional Law	Daniel Halberstam	4.00		4.00	PS
LAW	569	001	Legislation and Regulation	Daniel Deacon	4.00		4.00	PS
LAW	580	001	Torts	Scott Hershovitz	4.00		4.00	PS
LAW	594	003	Legal Practice Skills II	Beth Wilensky	2.00		2.00	PS
LAW	622	001	Editing and Advocacy Law and Letters	Patrick Barry	1.00		1.00	PS
Term Total					**15.00**		**15.00**	
Cumulative Total				**GPA: 4.000**		**12.00**	**30.00**	

Continued next page >

Control No: E188948901 Issue Date: 04/10/2022 Page 2

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Hill,Justin
Student#: 72626280

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2020			**(August 31, 2020 To December 14, 2020)**					
LAW	620	001	Disability Rights	Samuel Bagenstos	3.00	3.00	3.00	B+
LAW	641	001	Crim Just: Invest&Police Prac	Eve Primus	4.00	4.00	4.00	A
LAW	648	001	Advanced Constitutional Interp	Richard Primus	4.00	4.00	4.00	A-
LAW	885	002	Mini-Seminar Health Justice and Systemic Inequality	Samuel Bagenstos	1.00		1.00	S
LAW	992	306	Research: Special Projects Civil Rights Litigation Clearinghouse	Margo Schlanger	3.00	3.00	3.00	A
Term Total				**GPA: 3.764**	**15.00**	**14.00**	**15.00**	
Cumulative Total				**GPA: 3.873**		**26.00**	**45.00**	
Winter 2021			**(January 19, 2021 To May 06, 2021)**					
LAW	669	001	Evidence	Eve Primus	4.00	4.00	4.00	A-
LAW	716	001	Complex Litigation	Maureen Carroll	4.00	4.00	4.00	A
LAW	730	001	Appellate Advoc:Skills & Pract	Evan Caminker	4.00	4.00	4.00	A
LAW	992	306	Research: Special Projects Civil Rights Litigation Clearinghouse	Margo Schlanger	3.00	3.00	3.00	A
Term Total				**GPA: 3.920**	**15.00**	**15.00**	**15.00**	
Cumulative Total				**GPA: 3.890**		**41.00**	**60.00**	

Continued next page >

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Hill,Justin
Student#: 72626280

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2021	**(August 30, 2021 To December 17, 2021)**							
LAW	451	001	Global Constitutionalism	Daniel Halberstam	2.00	2.00	2.00	A
LAW	677	001	Federal Courts	Leah Litman	4.00	4.00	4.00	A
LAW	681	001	First Amendment	Don Herzog	4.00		4.00	P
LAW	718	001	Jurisprudence	Scott Hershovitz	3.00	3.00	3.00	A-
Term Total				**GPA: 3.900**	**13.00**	**9.00**	**13.00**	
Cumulative Total				**GPA: 3.892**		**50.00**	**73.00**	
Winter 2022	**(January 12, 2022 To May 05, 2022)**							
Elections as of:	04/10/2022							
LAW	779	001	Prisons and the Law	Margo Schlanger Amy Fettig	2.00	2.00	2.00	A
LAW	788	001	Habeas Corpus	Leah Litman	2.00			
LAW	978	001	Veterans Legal Clinic	Matthew Andres Carrie Floyd	4.00			
LAW	979	001	Veterans Legal Clinic Seminar	Matthew Andres Carrie Floyd	3.00			

End of Transcript
Total Number of Pages 3

This transcript is printed on special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required.

A BLACK AND WHITE TRANSCRIPT IS NOT AN ORIGINAL

University of Michigan Law School
625 S. State Street
Ann Arbor, MI 48109

Eve Brensike Primus
Yale Kamisar Collegiate Professor of Law
ebrensik@umich.edu

April 14, 2022

The Honorable Jane Kelly
United States Courthouse
111 Seventh Avenue, SE
Cedar Rapids, IA 52401-2101

Dear Judge Kelly:

Justin Hill is an excellent legal analyst, a skilled researcher and writer, and a dedicated public servant. He will be a wonderful law clerk to whomever is fortunate enough to hire him, and I am happy to write this recommendation on his behalf.

I first met Justin when he was a student in my criminal procedure course in the fall of 2020. Even though the class had almost ninety students and was conducted over Zoom, Justin was one of the most valuable classroom participants. He could quickly cut to the chase, identify the important legal issues in any question, and apply existing doctrine to the fact pattern with ease. Even more impressive, it was clear to me from early in the semester that Justin also could think across doctrines and borrow law from one area to address problems in another if the doctrine was not as clear. He understands black letter law, history, and policy arguments and is always attentive to the interaction between them and how the law affects people on the ground. And his mind is so agile. His raw candle power and analytic skills were on sharp display throughout the semester.

It didn't surprise me at all when Justin wrote one of the best final examinations in the course. When answering issue-spotters, his writing was systematic, logical, and clear. He was able to identify the issues quickly, address both sides of the argument, and formulate reasoned conclusions based on the governing case law. For example, one complicated fact pattern involved the stop and search of a vehicle. Justin's answer deftly wove through the Fourth Amendment's various exceptions to the probable cause and warrant requirements as he discussed both the case law and the policy rationales for the doctrine. Not only did he correctly identify all of the issues; he also wrote clearly and succinctly, analogizing to and distinguishing the relevant precedent with ease. I am confident that he will prove to be a wonderful asset in drafting bench memoranda and judicial opinions.

Justin also wrote the best answer in the class on the policy question. Students were tasked with assessing whether proposed technological reforms would advance or detract from the goals of the Fourth and Fifth Amendments. Justin's answer incorporated constitutional theory, constitutional doctrine, social science, and subconstitutional rules and standards. It was nuanced, thorough, and beautifully written. I know that Justin would prove invaluable during discussions about how to address difficult legal issues that come through your chambers.

Justin is also a skilled oral advocate, which I learned when he enrolled in my Evidence class. In addition to a written examination component, my Evidence course also has an oral examination in which students are expected to object in real time to simulated trial testimony, state the grounds for their objections, and answer queries from the bench about the rules' scope and application. Justin not only knew the evidence rules, but also knew how to talk about the purposes behind the rules when arguing for their expansion or contraction. His arguments were crisp, concise, and clear. I was not surprised to learn that he recently advanced to the final round of the Henry M. Campbell Moot Court Competition – the law school's oldest and most prestigious oral advocacy competition.

Justin's performance in my courses is representative of his performance throughout law school. His hard work and keen intellect have earned him a spot in the top 5% of his class, and his skills as a researcher and writer led to his selection to serve as an Articles Editor for the Michigan Law Review.

In fact, I was so impressed by Justin's performance in my courses that I have asked him to co-author an article with me. Every year, I select one student to invite to co-author a piece that summarizes the United States Supreme Court's criminal law and procedure decisions for a judicial audience. (The article is published in The Court Review each winter.) I am always careful to pick a student who is both an intelligent and informed reader of case law and who also has excellent writing skills. This year, it was an easy choice, and I am looking forward to working with Justin as a co-author this spring.

Justin would also come to your chambers with experience as a judicial law clerk at the federal district court level. He will spend next year clerking for Judge Jia M. Cobb in the U.S. District Court for the District of Columbia. As a result, he will be familiar with the federal system, judicial writing, and the demands placed on law clerks.

After his clerkships, Justin hopes to do appellate work either as a civil rights litigator or a public defender. Justin is an aspiring public servant who is devoted to helping others less fortunate. He spent his 1L summer at Rights Behind Bars, an organization devoted to representing pro se incarcerated plaintiffs on appeal. During his 2L summer, he worked in the appellate division of the Maryland Office of the Public Defender. Justin loves research and writing about new areas of law and hopes to put his considerable talents to use working with and for underprivileged communities.

Finally, Justin is a delight to work with. He is smart, respectful, diligent, mature, and self-motivated. I know that he would fit easily into any group of law clerks. In short, I think that Justin's intellect, dedication, and skill set will make him a wonderful law clerk to whoever is fortunate enough to hire him, and I am happy to give him my highest recommendation.

Please don't hesitate to contact me should you require any additional information.

Sincerely,

Eve Brensike Primus

Eve Brensike Primus - ebrensik@umich.edu - 734-615-6889

University of Michigan Law School
625 S. State Street
Ann Arbor, MI 48109

Margo Schlanger
Wade H. and Dores M. McCree Collegiate Professor of Law
mschlan@umich.edu, 202-277-2506

April 14, 2022

The Honorable Jane Kelly
United States Courthouse
111 Seventh Avenue, SE
Cedar Rapids, IA 52401-2101

Dear Judge Kelly:

This is a letter in support of my student Justin Hill's application for a clerkship in your chambers in 2023/24, after he completes a clerkship with Judge Jia Cobb, on the D.C. District Court. I know Justin's work particularly well because he has both been my student and worked closely with me for almost two years on a project I run, the Civil Rights Litigation Clearinghouse. Justin is smart, engaged, and hard-working. He's a terrific writer and editor, too. He is going to be a great law clerk and lawyer, and I recommend him with enthusiasm.

You can see from Justin's transcript and resume that he has outstanding grades and a sustained interest in public interest work—particularly related to criminal justice. He is also an Articles Editor for the Law Review and a really active contributor to Michigan Law's student organizations. What I can add is my deep knowledge of his work and work ethic, based on his terrific contributions to the Civil Rights Litigation Clearinghouse, a web-based archive of documents and data about civil rights injunctive cases. (You can see the Clearinghouse at http://clearinghouse.net.) I founded the Clearinghouse in 2006; since that time, I've had over two hundred law student research assistants. Those who succeed as research assistants—and Justin has been extremely successful—learn a great deal. The research centers around reading and understanding the dockets and documents in complex civil rights cases. Clearinghouse assignments accustom my research assistants to reading case records; familiarize them with some of the ins and outs of complex multi-year litigation; and give them the habit of writing for publication, with all the call for precision and accuracy that entails. In his first year, Justin worked hard at the Clearinghouse, researching and summarizing a large number of complex civil rights class actions, mostly involving criminal justice reform. The results are excellent; he writes clearly and well, and he was able to understand and explain long and twisty case histories. His summaries are published on the website (you can retrieve and read them on its search page, if you like).

Justin was one of the best students on the Clearinghouse project in his class, so I was really pleased when he accepted my job offer to be the project manager for the Clearinghouse this past school year; I trained him for that in summer 2020. Each week, I assigned him some complicated task or type of case he hadn't yet seen, he worked on it, and then we did a zoom call to go over the work. From this closer vantage point, I was even more impressed by the quality of his work.

Then, over the past two years, Justin has managed student volunteers who were new to the project—helping to train them, making sure they had appropriate work to do, supervising them, and reviewing and editing their work. He has handled each of his assignments with both judgment and enthusiasm, and really helped get the best work out of the volunteers. He has great initiative and has taken particular responsibility for the policing cases, which have multiplied and been especially active. He also stepped up to lead a project that was farther from his interests, collaborating with School of Information students to evaluate the Clearinghouse's user interface and workflow, and to propose improvements. He did fantastic work on both of these projects.

Finally, I taught Justin in a class on Prisons and the Law, this past semester. It was a condensed class—I've already given and graded the final. Justin's work in the class was absolutely outstanding. He wrote a truly impressive exam (the best in the class), and his class participation was invariably spot-on and insightful.

So all in all, I can tell you that Justin is terrific—smart, focused, dedicated, responsible. He writes especially well, and he works independently but takes direction. I should say, too, that Justin is very good company and would be a pleasure to have around chambers. And he'd come to you with skills further developed by his first, pending clerkship.

In short, I recommend Justin to you without reservation. Please let me know if I can answer any questions or give you any additional information.

Yours,

Margo Schlanger - mschlan@umich.edu

Margo Schlanger

Margo Schlanger - mschlan@umich.edu

The University of Michigan
Law School

Leah Litman
Assistant Professor of Law

January 18, 2022

The Honorable Jane Kelly
United States Courthouse
111 Seventh Avenue, SE
Cedar Rapids, IA 52401-2101

Dear Judge Kelly:

I'm pleased to write this letter of recommendation for Justin Hill, Michigan Law class of 2022, who has applied for a clerkship in your chambers. I've gotten to know Justin, as he was a student in my fall 2021 Federal Courts class and also the articles editor for a piece I'm publishing in the Michigan Law Review. From what I've observed, Justin definitely has the analytical, writing, research, and interpersonal skills to succeed as an appellate clerk. I very much hope you consider this application.

I got to know Justin as a student in my fall 2021 Federal Courts class. Federal Courts is a notoriously difficult class, in part because it attracts all of the top performing students in a class. The fall 2021 Federal Courts class was no exception. I run the class through the Socratic method and call on 20-30 students per class, so I had the opportunity to speak with Justin at least once a week. In the course, students complete two written assignments in addition to a final exam. And Justin also came to office hours a handful of times.

Justin's participation in the course was consistently high quality. Again, I had the opportunity to speak with him about once per week, and I think there was only one occasion where he didn't have the case details ready at hand. He didn't volunteer often (I think only a handful of times if my notes are correct), but each time he did he advanced the ball in the discussion.

Justin's written work in the course was top notch. From both his interim assignments and his exam, it's clear he's a very organized thinker and writer. Even on time limited exams, he produced written work that was organized in logical ways, laid out an affirmative case before addressing counter arguments, and was easy to read. His analytical skills and ability to work with case law was particularly good. The analogies and distinctions he drew reflected very close readings of the cases.

The interim assignments and exam reflect real world issues in federal courts – the final exam modeled after an actual case involving implied rights of action and sovereign immunity, and the interim assignment modeled after actual cases on justiciability and adequate and independent state ground doctrine. I mention that because part of what Justin showed on the exam was an ability to dig into real world, messy facts, rather than stylized exam hypos, and perform top quality legal analysis.

I have also had the chance to work with Justin as an editor – he is the lead articles editor assigned to a piece I am publishing with the Michigan Law Review. In that capacity, Justin has provided me with substantive feedback on the article as well as editing recommendations. In both respects, I've been very impressed with what Justin has offered on the article. (For what it's worth the article is more doctrinal than the modal law review, so I think the substantive suggestions he's offering speak more to his ability as a law clerk than they might for another article.) Justin's substantive edits suggested he had really read into this area of law so as to be able to offer recommendations for other cases I might cite, and other counter-arguments to address. They're probably the best substantive edits I've received from any law review editor. And his writing suggestions were also very welcome and greatly improved the piece.

On an interpersonal level, Justin is a little on the quiet side but also seems easy to work with and well liked among his peers. He would be receptive to feedback and a team player.

If you have any questions, I am happy to answer them. I can be reached on my office phone (734)-647-0549, cell phone (202)-374-3231, or on email (lmlitman@umich.edu). (For whatever it is worth, I clerked for two years, once on the U.S. Court of Appeals for the Sixth Circuit and once on the U.S. Supreme Court, before I practiced for a few years, and have some sense of what it takes to succeed as a law clerk.) I think that Justin certainly has the skills to succeed as a law clerk, and I strongly recommend him for a clerkship in your chambers.

Justin will also arrive in chambers having completed a district court clerkship with Judge Cobb on the District Court for the District of Columbia. So he will have that training and experience under his belt, which will allow him to really hit the ground running.

Respectfully,

Leah Litman - lmlitman@umich.edu

Leah M. Litman

Leah Litman - lmlitman@umich.edu

RBB

Date: February 18, 2021

Dear Judge,

I am the Executive Director of Rights Behind Bars (RBB), and I am writing to enthusiastically recommend Justin Hill for a clerkship in your chambers. Justin was a summer intern for RBB in 2020.

I founded RBB in Fall 2019, initially with a staff of one. RBB's main practice initially involved identifying *pro se* prison conditions cases that lost in the federal district courts but could plausibly win with counsel on appeal, then stepping in to provide that appellate representation. Just a few months later, Justin applied to be one of our first summer interns. I did not interview him at first, as I assumed he had sent a scattershot application to us given that he had a 4.0 at the University of Michigan and a background in accounting and thus seemed an odd fit for a one-man appellate prison conditions office. He kept emailing me, however, about how enthusiastic he was about our work so I relented and interviewed him. He was terrific and when I offered him the job he accepted on the spot. I would come to learn that the reason he turned down other opportunities that were more prestigious (and others that were certainly more remunerative) to work for an office with one lawyer and dozens of cases in the federal courts of appeals is that he thought this would give him the best opportunity to do deeply substantive work on which he was passionate.

I feel this in itself speaks highly of Justin but, more importantly, he was right. I threw Justin in the deep end and he handled everything I threw at him and then some. He did a lot of the work one would expect from a summer intern, such as cite-checking and bluebooking a number of federal appellate briefs and was excellent. But he also wrote a portion of several of our briefs, including a reply brief in support of a petition for certiorari that the United States Supreme Court granted, summarily reversing the lower court for denying relief to our client. He also wrote a lengthy memo about a recurring issue in our cases on whether and under what circumstances the Americans with Disabilities Act validly abrogates the sovereign immunity of the states. This was an incredibly difficult assignment, as the circuits are not only scattered on the question but many of the cases with the most important holdings have done so without any explicit analysis of the question, making both the compiling and analysis of the relevant cases very difficult. He did an outstanding job, not only writing the memo but also giving me guidance on how to handle this issue which lurked beneath several of our appeals even if not squarely addressed. Needless to say, this is not typical 1L summer stuff.

I can also speak very highly about Justin's character. The summer of 2020 was of course interrupted by COVID-19 and we unexpectedly had to do the summer entirely remote. He was very flexible and produced excellent work even in chaotic circumstances. Our other intern, a terrific student from Yale Law School, had some personal difficulties that summer and she described to me regularly how supportive Justin was and how he was always there to help either with a kind word or to help with her work. This even though the two had never met in-person, just as they had never met me in-person.

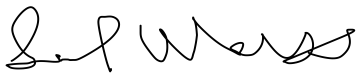
Justin and I have stayed in touch in the months since his internship. We have had, for example, phone calls brainstorming subjects for his Note where he talked fluidly about qualified immunity, sovereign immunity, and substantive prison law, both the current state of the doctrines and normatively what they should be. I have found that this deep understanding of the roots and

RBB

consequences of complicated legal doctrines is rare in a law student, no matter their school or their grades.

I clerked for the Ninth Circuit Court of Appeals and have litigated many cases in the federal courts of appeals. I am not feigning humility in saying that Justin is ahead of where I was at his stage and that while I was a perfectly good law clerk, he will be an outstanding one. Please contact me if you have any further questions or if I can provide any other information.

Sincerely,



Samuel Weiss

Executive Director
Rights Behind Bars
Tel: 202-455-4399
416 Florida Avenue NW #26152
Washington, DC 20001
sam@rightsbehindbars.org

Justin Hill
840 Brookwood Place, Ann Arbor, MI 48104
(415) 308-8936 • hilljust@umich.edu
He/Him/His

Writing Sample No. 1

I am competing in Michigan Law's Campbell Moot Court competition. This was the brief I submitted this past week for the quarterfinal round. I researched and wrote this brief solely by myself, though the specific positions I advance do not necessarily reflect what I believe is the correct outcome of the case—I was assigned a side and made the best arguments for that position.

Justin Hill
Writing Sample No. 1

IN THE

Supreme Court of the United States

No. 21-0035

SARAH EDMONDSEN,
Petitioner,

v.

HUTCHINS SCHOOL DISTRICT BOARD OF EDUCATION,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF HUTCHINS

BRIEF FOR PETITIONER

Justin Hill
Counsel of Record

Justin Hill
Writing Sample No. 1

TABLE OF CONTENTS

Justin Hill
Writing Sample No. 1

TABLE OF AUTHORITIES

Cases

Justin Hill
Writing Sample No. 1

Other Authorities

Constitutional Provisions

Justin Hill
Writing Sample No. 1

STATEMENT OF THE CASE

As a devout member of the Church of Darrow, Sarah Edmondsen occasionally consumes psilocybin during religious ceremonies to attain a trance-like state. *Edmondsen v. Hutchins Sch. Dist. Bd. of Educ.*, 913 F.4th 1, 2 (12th Cir. 2021). She views this practice to be a "divine sacrament" that helps her connect with the spiritual world. *Id.* All parties here concede this is a sincere belief that is central to her religion. *Id.* However, Edmondsen's religious practice conflicts with her school's drug policy, which prohibits using hallucinogenic substances. *Id.* The Hutchins School Board, composed of adult members and one Student Representative, sets policies for Hutchins High School, including the drug policy. *Id.* at 10; 37 app. A. The drug policy includes an escalating punishment scheme: first-time offenders are suspended for ten days, two-time offenders are suspended for 60 days, and three-time offenders are expelled from school. *Id.* at 38 app. A.

In August 2020, Edmondsen discussed her religious practice with classmates and teachers. *Id.* at 2. Edmondsen is one of the few members of a minority religion at her school; most of her classmates and teachers are Christian. *Id.* at 44 app. C. After learning that Edmondsen had consumed psilocybin, teachers told the school principal that Edmondsen had violated the school's drug policy. *Id.* When the principal questioned her, Edmondsen explained that she used psilocybin only for religious purposes and under the supervision of church elders. *Id.* at 2–3. Neither party in this case alleges that Edmondsen was ever under the influence of psilocybin at school, nor does either party allege that Edmondsen brought psilocybin to school. *Id.* Nonetheless, Edmondsen was suspended for ten days after she failed a drug test due to her religious practice. *Id.* at 3.

Edmondsen sought to change the school's drug policy to accommodate religious minorities. She campaigned to be the Student Representative and was elected for the 2020–21 term. *Id.* She was re-elected the following year. *Id.* As Student Representative, Edmondsen regularly attends School Board meetings to represent her classmates' interests. *Id.* at 38 app. A.

Other students are not formally required to attend school board meetings, but often go to accept awards or to contribute their opinions to policy discussions. *Id.* at 44 app. C.

On October 1, 2020, Edmondsen attended her first school board meeting. *Id.* at 3. The Board maintains a policy allowing volunteers from the community to deliver prayers before board meetings on a first-come, first-served basis. *Id.* at 38 app. A. The Board believes the prayer lends solemnity to the proceedings and accommodates Board members' spiritual needs. *Id.* at 4. Although the Board's policy does not require the President to wait for non-adherents to leave the room before the prayer begins, it does require the President to leave "ample time" for people to return who decided to leave before calling the meeting to order. *Id.* at 38 app. A.

At the October 1 meeting, the volunteer pastor invited listeners to "bow [their] heads in prayer" and concluded, "In the name of the Father, Son, and Holy Spirit, Amen." *Id.* at 40–41 app. B. Edmondsen chose to stay in the room out of concern that stepping out would bias the Christian school board members against her advocacy. *Id.* at 4. But as a member of a minority religion, she felt excluded by the Christian prayer. *Id.* Edmondsen sued the Board in the Western District of Jeffries, bringing a Free Exercise claim that sought to enjoin the drug policy and an Establishment Clause claim that sought to enjoin the pre-meeting prayer. *Id.* at 4–5. The district court held in favor of the Board on both claims and Edmondsen appealed to the Twelfth Circuit. *Id.* at 5. The Twelfth Circuit initially affirmed the district court's holding on the Free Exercise claim but reversed on the Establishment Clause claim. After a rehearing *en banc*, the Twelfth Circuit affirmed on both claims. *Id.* at 4–5. Edmondsen appealed again and this Court granted certiorari.

DISCUSSION

The First Amendment includes two religion clauses. The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion" and the Free Exercise

Clause states that Congress cannot "prohibit[] the free exercise" of religion. U.S. CONST. amend. I. Together, the two clauses prohibit the government from advancing religion, inhibiting individual religious practice, or favoring one religion over another. *See Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947). When the Hutchins School Board prevented Edmondsen from exercising a central practice of her religion, but forced her to listen to prayer in a school setting that overtly promoted the majoritarian religion, the Board violated the First Amendment by advancing majoritarian religion at the expense of minority religions.

This Court should recognize that prayer at school board meetings violates the Establishment Clause because it coerces students to participate in religious exercise. This Court should also rectify its mistake in *Employment Division v. Smith* and scrutinize laws that burden religious practice more closely to ensure that Free Exercise rights are adequately protected.

I. The school board's pre-meeting prayer practice falls outside of the legislative prayer exception because it creates an unconstitutionally high risk of coercion.

Marsh v. Chambers carved out a narrow exception from the Establishment Clause's general prohibition against state-sponsored religion. 463 U.S. 783 (1983). This Court upheld the Nebraska legislature's practice of hiring a chaplain to deliver a prayer before daily legislative sessions by finding that the First Congress used a similar practice mere days before agreeing on the final language of the First Amendment. *Id.* at 787–89. Such conclusive historical evidence confirmed that the Establishment Clause was not meant to prohibit this religious practice. *Id.* at 795.

In *Town of Greece*, the legislative prayer exception was expanded slightly to cover prayer before town board meetings, too. 575 U.S. 565 (2014). This Court concluded that the pre-meeting invocation fell within the legislative prayer exception because it "comport[ed] with our tradition" and "[did] not coerce participation by nonadherents." *Id.* at 591–92. Even though *Town of Greece* did not define what falls within the legislative prayer exception, it did clarify what falls outside of

it: coercive prayers. *Id.* at 586–87; 591–92. Therefore, even if Hutchins's pre-meeting prayer satisfies all of the other criteria for the legislative prayer exception, it still would not be exempted from the Establishment Clause's prohibition if it was found to be unconstitutionally coercive.

The coercion test imposes stricter restrictions on state-sponsored religious practices that affect students. The legislative prayer exception recognizes this limitation—it "assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith." *Town of Greece,* 572 U.S. at 584. Because students lack the same fortitude as adults to resist coercion, *see infra* Section I.B, this Court has found that prayer in school settings "carr[ies] a particular risk of indirect coercion." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). When this risk of coercion exists, and if students do not have a meaningful choice to abstain from the event, the pre-deliberation prayer violates the Establishment Clause even if it would have been upheld in a non-school-focused setting.

An excessive risk of coercion can complete a constitutional violation by itself—students do not need to show that they were actually manipulated to violate the Establishment Clause. In *Lee v. Weisman*, a fourteen-year-old plaintiff challenged her school principal's decision to invite a local rabbi to deliver a prayer before middle school and high school graduation ceremonies. 505 U.S. 577, 580 (1992). This Court invalidated the state-sponsored prayer because it created an "atmosphere … in which the student was left with no alternative but to submit." *Id.* at 592, 597. It was the atmosphere, not the student's actual submission to coercion, that established the constitutional violation. This Court has invalidated other instances of prayer in environments that imposed a similarly high level of coercive pressure on students. *See, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S 290 (2000) (prayer before football games created a coercive environment); *Engel v. Vitale*, 370 U.S. 421 (1962) (same for prayer in classrooms).

Here, there is an unconstitutionally high risk of coercion because many students are effectively required to attend school board meetings, where their young age and vulnerability to school-imposed punishment diminishes their ability to resist coercion.

A. Students do not retain private choice to abstain from the coercive environment because they are effectively required to attend school board meetings.

While students attended the legislative sessions in *Marsh* and *Town of Greece*, their decision to attend was largely voluntary. The Establishment Clause was not offended because those students retained private choice on whether to submit to a highly coercive environment. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002). True, the students may have felt obligated to attend to receive an award, but their absence would not have resulted in any negative consequences for them. Here, however, students are effectively required to attend school board meetings to fulfill their extracurricular commitments or exercise their voice in the political process.

As the Student Representative, Sarah Edmondsen must attend school board meetings to fulfill her commitment of representing her classmates' interests. Although she may not be required to attend every single meeting, this Court has rejected such a formalistic distinction. In *Santa Fe Indep. Sch. Dist. v. Doe*, plaintiffs challenged a Texas high school policy that allowed students to vote on whether a prayer should be delivered before football games and which student should deliver the prayer. 530 U.S at 296–98 (2000). After students voted in favor of the prayer, this Court held the practice to be unconstitutional because it "threaten[ed] the imposition of coercion upon those students not desiring to participate in a religious exercise." *Id.* at 317. This Court rejected the argument that students were not required to attend football games, finding that some students—cheerleaders, band members, and football players—had seasonal commitments that mandated their

attendance. *Id.* at 311. Likewise, Edmondsen's attendance at the school board meetings is effectively required given her commitment to represent her classmates' interests.[1]

Other students may feel similarly required to attend school board meetings to participate in the political process. Unlike the deliberative bodies in *Marsh* and *Town of Greece*, the Board's constituents—students in Hutchins School District—cannot vote out Board members who enact unfavorable policies. Instead, advocacy at school board meetings provides their only means for changing policy. Students are thus faced with a choice: subject themselves to an unconstitutional risk of coercion or forfeit their voice in the political process. "It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice." *Id.* at 312 (quoting *Lee*, 505 U.S. at 596). Because students are effectively required to attend these meetings, the Board has deprived them of their private choice to abstain from state-sponsored religious practice. *Cf. Zelman*, 536 U.S. at 653.

B. Students are uniquely susceptible to coercion due to their young age and vulnerability to control by school officials.

The age of high school students makes them uniquely vulnerable to coercive influences on their religious beliefs. Adolescence is the time in a person's life when they make their most significant progress in developing their sense of identity. Emily Buss, *The Adolescent's Stake in the Allocation of Educational Control Between Parent and State*, 67 U. Chi. L. Rev. 1233, 1259–60 (2000). To be sure, humans evolve their personal identity over the course of their entire life.

[1] Every circuit court to have considered the question appears to agree that prayer before school board meetings is unconstitutional when a student sits on the school board. *Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1151 (9th Cir. 2018); *Am. Humanist Ass'n v. McCarty*, 851 F.3d 521, 528 (5th Cir. 2017); *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 282 (3d Cir. 2011); *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 385 (6th Cir. 1999).

But it is during adolescence, after a person has developed the capacity to engage in abstract thinking, that these developments occur most rapidly. *Id.* at 1260; 1266–67.

This Court has carefully guarded students' beliefs from indoctrination at this critical stage of development. In *Edwards v. Aguillard*, this Court noted that it is "particularly vigilant" about Establishment Clause violations in the educational context because "[t]he State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." 482 U.S. 578, 584 (1987). Almost every other Establishment Clause case involving students repeats this same concern for students' vulnerability. *See, e.g.*, *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985) ("The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice.").

Students are also more susceptible to coercion in school environments because school officials exert a high degree of control over them. School officials can punish conduct that would otherwise be permissible if performed by an adult. *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985). And students do not need to have clear notice which conduct is prohibited—this Court has stated that school disciplinary codes may be vaguer than ordinary criminal codes. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986). So because students know that they could be punished for an undefined amount of misconduct, they would likely feel compelled to participate in a school-sponsored religious activity out of fear that they would be punished for not participating.

The potential for school-imposed punishment distinguishes this case from *Town of Greece*. The school board has power to discipline students in ways that the town board could not. *Edmondsen*, 913 F.4th at 3 (noting the Board has disciplinary powers). Students may logically

have concluded that the Board's President possessed these same powers. So when the President invited the volunteer pastor to "lead us" in prayer, students may have assumed that they would be punished if they did not obey. *See id.* at 40 app. B. Because there is an increased likelihood that non-adherents will feel incapable of dissenting, this prayer practice is unconstitutional even though it shares many features with the practice upheld in *Town of Greece*.

C. Offering students the opportunity to step out of the room does not cure the coercive environment because it diminishes the status of non-adherents when they seek to participate in the political process.

The coercive pressure is not cured by giving students the option to step out of the room during the invocation. For one thing, students at the Hutchins School Board meetings were not given time to exit the room *before* the prayer began, so they could have been coerced into participating in the prayer before even realizing what was happening. But even if students were given time, this Court has already found that coercive environments are not "mitigated by the fact that individual students may absent themselves." *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 224–25 (1963). By the time students are offered the choice to leave the room, the constitutional violation has already occurred—it is the risk of coercion, not a showing of being physically coerced, that completes the constitutional violation.

More fundamentally, because students cannot vote, school board meetings represent students' best option to participate in the political process and change the policies that affect their everyday lives. Students should not be forced to leave a room in which they seek to be viewed as equals. Forcing non-adherents to leave the room would reduce their standing in the community, violating a central tenet the Establishment Clause. "The Establishment Clause … prohibits government from … making adherence to a religion relevant in any way to a person's standing in the political community." *County of Allegheny v. ACLU*, 492 U.S. 573, 593–94 (1989) (internal quotation omitted).

Justin Hill
Writing Sample No. 1

The anti-coercion principle does not prevent the Board from accommodating its Board members' spiritual needs. The school board could request a moment of silence and Board members could pray silently if they desired. But accommodating one person's religion does not justify infringing another's rights. The school's policy is unconstitutional and it should be enjoined.

II. *Employment Division v. Smith* should be overruled to provide adequate protection for religious minorities and stare decisis does not counsel otherwise.

This Court earns its legitimacy by articulating even-handed, principled legal standards. Stare decisis promotes this goal by recognizing that "in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (cleaned up). However, stare decisis is not "an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). Indeed, stare decisis is "at its weakest" when a case involves a constitutional question because only this Court can rectify errors of constitutional interpretation. *Janus v. AFSCME*, 138 S. Ct. 2448, 2478 (2018). If there is a "special justification" beyond simply believing that a prior decision was wrongly decided, then the error should be fixed to preserve this Court's legitimacy. *See Halliburton Co. v. Erica P. John Fund*, 573 U.S. 258, 266 (2014).

Employment Division v. Smith created a test that disadvantages the religious practices of minority religious groups. It is the product of exceptionally poor reasoning and has proven to be far more unworkable than anticipated. Moreover, the majority of the country has rejected the *Smith* test in favor of alternatives that more adequately protect minority religions. This Court should recognize *Smith*'s errors by overruling it and replacing it with a strict scrutiny standard.

A. *Smith* was based on exceptionally poor reasoning because it refused to acknowledge that it reversed decades of Free Exercise precedent.

Before *Smith*, claims seeking exemptions from statutes that burdened religious practice were adjudicated under the test announced in *Sherbert v. Verner*: laws that burdened religious liberties could be upheld only if the government showed that they served a compelling state

interest. 374 U.S. 398 (1963). *Sherbert* was faithfully applied for 27 years before *Employment Division v. Smith* reversed this consistent line of precedent in 1990. 494 U.S. 872 (1990). *Smith* featured two Native American plaintiffs who ingested peyote as part of their religious practice. *Id.* at 874. Their employer fired them due to their use of peyote and their subsequent applications for unemployment benefits were denied because they had been fired for work-related "misconduct." *Id.* The plaintiffs sued, alleging that the Oregon law criminalizing peyote unconstitutionally burdened their Free Exercise rights as protected by the First Amendment. *Id.* at 874–76.

Neither of the parties in *Smith* advocated for overturning the *Sherbert* test and they did not brief the issue. Nonetheless, *Smith* reversed nearly thirty years of precedent by distorting prior cases to avoid formally overruling them. *Smith*'s new test stated that neutral, generally applicable laws did not require religious exemptions, no matter how severely religious exercise was burdened. *Id.* at 979. It carved out exceptions to this rule, but these carve-outs served only to artificially distinguish prior cases that contradicted *Smith*'s new test.

1. *Smith* invented a new test that lacked any precedential support.

Smith cited only one case, *Minersville Sch. Dist. Bd. of Educ. v. Gobitis*, that directly supported its new test. *Id.* at 879 (citing *Gobitis*, 310 U.S. 586, 594–95 (1940)). But *Gobitis* was overruled three years after it was decided. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). The complete lack of valid precedential support reveals *Smith*'s stark break from Free Exercise doctrine.

To disguise its lack of precedential support, *Smith* grafted new reasoning onto old cases. These cases were specially plucked as examples that would have reached the same result if they were decided under *Smith*'s test instead of their actual reasoning. Although they may have reached the same result, their dissimilar reasoning undercuts their precedential support. The first case,

Reynolds v. U.S., upheld a conviction under a polygamy statute by reasoning that the government could prohibit religious conduct, even if it could not prohibit religious beliefs. 98 U.S. 145, 166–67 (1878). Not only does this reasoning fail to support the *Smith* test, it has also proven contrary to the original public meaning of the Free Exercise clause. *See supra* Section II.B. The other two cases, *Prince v. Massachusetts* and *Braunfeld v. Brown*, feature reasoning more akin to interest-balancing than *Smith*'s test. *Prince*, 321 U.S. 158, 161–63 (1944) (upholding a child labor law against a religious challenge because the government had a sufficient interest in "protect[ing] the welfare of children"); *Braunfeld*, 366 U.S. 599, 607–09 (1961) (balancing competing interests and holding that an "indirect" burden did not violate the Free Exercise clause).

No valid precedent supported *Smith*'s test because it reversed decades of Free Exercise jurisprudence. Before *Smith*, the "clearest command of the Establishment Clause [was] that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). *Smith* nullified this principle by creating a test that forced religious minorities to seek exemptions from generally applicable law through the political branches instead of the courts. But due to the majoritarian nature of the political branches, minority religions are less able than popular religions to amass the political support needed to secure an exemption. The federal analogue of this case provides an example—Native American tribes were able to generate enough political support to secure a religious exemption from the Controlled Substances Act for peyote use, even though other religions with equally sincere beliefs were not given a similar exemption. *See* 21 CFR § 1307.31 (2005).

Smith acknowledged that its new test would "place at a relative disadvantage those religious practices that are not widely engaged in," but justified this inequality as the "unavoidable consequence" of providing a workable test. 494 U.S. at 890. Over time, this assertion has proven

to be entirely false. *See infra* Section II.B. The Court's abdication of its role as the counter-majoritarian branch provides the requisite special justification for overruling *Smith*'s error because the Establishment Clause demands equality for all religions.

2. To avoid admitting how far the new test departed from Free Exercise precedent, *Smith* distorted the holdings of prior cases that clashed with its desired outcome.

To overturn *Sherbert* silently, *Smith* claimed that the Court had "never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation." 494 U.S. at 883. This statement was patently false. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972) (invalidating a compulsory school-attendance law for burdening religious practice of Amish students). But even if it was true, it rests on artificial distinctions between cases that seem more concerned with achieving a desired outcome in *Smith* than crafting a principled legal test.

First, *Smith*'s claim that no statute had been "invalidated" under the *Sherbert* test carved around three cases that faithfully applied the *Sherbert* test, but ultimately concluded that the government's compelling interest did not permit religious exemptions. *Gillette v. U.S.*, 401 U.S. 437 (1971); *U.S. v. Lee*, 455 U.S. 252 (1982); *Hernandez v. Commissioner*, 490 U.S. 680 (1989). Inexplicably, *Smith* cited *Gillette*'s military draft law and *Lee*'s income tax law as examples of statutes that would be invalidated under the *Sherbert* test, even though both cases expressly upheld their respective laws under the *Sherbert* test without religious exemptions. 494 U.S. at 888–89.

Second, *Smith* claimed that *Sherbert*'s application was limited to cases involving unemployment benefits. 494 U.S. at 883–84. However, *Sherbert* itself never claimed to be so limited, and *Smith* failed to admit that the *Sherbert* test had been applied in many cases unrelated to unemployment benefits. *E.g.*, *Gillette*, 401 U.S. 437 (exemptions to military draft); *Hernandez*, 490 U.S. 680 (exemptions to income taxes). Even if *Sherbert* was limited to cases involving unemployment benefits, it still should have been applied in *Smith*, which asked whether Oregon

could "deny unemployment benefits" to people who consumed peyote for religious purposes. 494 U.S. at 874. *Smith*'s failure to understand its own artificial reasoning demonstrates its illogicality.

Finally, *Smith* could not rewrite some cases that faithfully applied the *Sherbert* test to hold in favor of religious exemptions. So *Smith* invented a new rule to distinguish them—"hybrid rights" cases, which combined a Free Exercise claim with another constitutional right like free speech or the right of parents to control their children's education, were still subject to the *Sherbert* test. *Id.* at 881–82. But *Smith* provided no doctrinal rationale explaining why two claims that were insufficient on their own demanded heightened scrutiny when combined. The lack of reasoning suggests this category was created only to distinguish precedent that conflicted with *Smith*'s desired outcome. This suggestion has been confirmed—this Court has not relied on the hybrid rights doctrine in the 30 years since *Smith* was decided. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1915 (2021) (Alito, J., concurring).

B. Factual and legal developments have further eroded *Smith*'s reasoning and proven the workability of the *Sherbert* test.

Legal developments have also eroded *Smith*'s holding. Widespread bipartisan support has resulted in federal and state legislation replacing the *Smith* test with some version of the *Sherbert* test in a majority of states. Congress enacted the Religious Freedom Restoration Act in 1993, explicitly re-adopting the *Sherbert* test for Free Exercise claims challenging federal laws. *See Fulton*, 141 S. Ct. at 1893–94 (Alito, J., concurring). Soon after, Congress passed the Religious Land Use and Institutionalized Persons Act, which applied the *Sherbert* test to land use and prison regulations. *Id.* at 1894. Finally, 32 states have rejected the *Smith* test by either passing legislation or interpreting their state constitutions to impose heightened scrutiny to laws challenged under Free Exercise claims. *Edmondsen*, F.4th 1, 22 n.18 (12th Cir. 2021); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839, 844 n.22, 845 n.26 (2014). The prevalence

of *Sherbert*-esque tests in lower courts has demonstrated its workability and further undermined *Smith*'s claim that widespread application of the *Sherbert* test would "court[] anarchy," given that no such chaos has resulted.

Smith's poor reasoning was also accented by its failure to consider the original meaning of the Free Exercise clause. A significant body of research produced after *Smith* has since revealed that the original public meaning of the provision embodied a principle like the *Sherbert* test: religious freedoms were protected unless they disturbed society's "peace and safety." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1461–66 (1990). And threats to the public peace and safety did not cover all violations of law; they were limited to violations that threatened injury to others. *See Fulton*, 141 S. Ct. at 1903–05 (Alito, J., concurring). This original understanding aligns with the *Sherbert* test—legislation enacted to promote peace and safety serves a compelling government interest, but otherwise the government must provide exemptions to avoid burdening religious practice. These factual developments provide an additional justification for returning to the *Sherbert* test.

C. *Smith*'s poor reasoning has led to multiple workability problems, confusing lower courts and yielding inconsistent results.

When a prior decision has proven unworkable over time, the policy considerations favoring stare decisis submit to the need for principled legal precedent to guide lower courts. *Payne*, 501 U.S. at 827–28. This Court has emphasized that legal tests resulting in "substantial judgment calls" are unworkable because they are "altogether malleable and not principled." *Janus*, 138 S. Ct. at 2481 (internal citation omitted). On three issues, *Smith*'s poor reasoning has forced lower courts to engage in the type of judgment calls that justify departing from stare decisis.

First, lower courts are helplessly confused by the hybrid rights doctrine. Some courts have tried to faithfully apply the doctrine, others require the secondary claim to be independently viable,

and a third group of courts ignore the doctrine entirely and treat it as dicta. *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 244–47 (3d Cir. 2008). This case demonstrates the unworkability of the doctrine, since it could plausibly be framed as a hybrid rights case—Edmondsen's parents have the right to direct the education of their child. *See Smith*, 494 U.S. at 881.

Second, the "neutral and generally applicable" standard has proven far more ambiguous than *Smith* anticipated. Recent litigation over COVID regulations demonstrates the difficulty in determining whether exemptions for secular activities indicate a law's hostility toward religion. In *South Bay United Pentecostal Church v. Newsom*, this Court upheld a California regulation that imposed an attendance cap on religious gatherings but allowed certain secular businesses—including supermarkets, pharmacies, and restaurants—to remain fully open. 140 S. Ct. 1613 (2020). Even though the law exempted some secular activities from the attendance restriction, this Court found the law to be neutral toward religion because it treated religious activities the same as comparable secular activities that gathered "large groups of people … in close proximity for extended periods of time." *Id.* at 1613 (Roberts, C.J., concurring). However, *Tandon v. Newsom* used a different standard for comparing religious and secular activities when it invalidated California's subsequent COVID regulation that restricted group events to include at most three households. 141 S. Ct. 1294 (2021). *Tandon* provided that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id.* at 1296 (emphasis in original). After *Tandon* and *Fulton*, the *Sherbert* test appears to be the dominant test since almost every statute includes an exception of some sort. Lower courts would be better served if this Court explicitly acknowledged this development and overturned *Smith* in favor of the *Sherbert* test.

Third, this Court has invalidated legislation found to be motivated by animosity toward religion, *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), but it has failed to provide a workable standard for identifying when legislators display animus. It is unlikely that such a standard could be created—legislation is produced through compromise between many different people and it is often unclear which legislators or comments influenced the final law. Even this Court's own recent decisions provide conflicting guidance about which comments bear constitutional significance. *Compare Masterpiece Cakeshop Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1729–30 (2018) (finding comments made by the Commission to indicate hostility toward religion) *with Trump v. Hawaii*, 138 U.S. 2392, 2435–36 (2018) (Sotomayor, J., dissenting) (noting that the majority opinion disregarded statements by President Trump that suggested religious animus).

D. Because individuals do not rely on *Smith* to arrange their economic or social lives, reliance interests fail to provide a counterweight in the stare decisis analysis.

No significant reliance interests counterbalance the workability problems caused by *Smith*'s faulty reasoning. For the stare decisis analysis, it is not significant that a state may need to rewrite its laws to include religious exemptions. Reliance interests are significant in the stare decisis analysis only if they involve individuals' arranging their economic or social lives based on a judicial decision. *See, e.g.*, *U.S. v. Gaudin*, 515 U.S. 506, 521 (1995) (noting that reliance interests are diminished when the prior case "does not serve as a guide to lawful behavior"). Because there are no such individual interests at stake here, this Court should not hesitate in correcting its Free Exercise jurisprudence.

CONCLUSION

This Court should reverse on both claims, enjoining the Board's unconstitutional prayer policy and remanding Edmondsen's Free Exercise claim to be adjudicated under the *Sherbert* test.

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Writing Sample No. 2

The summer after my first year of law school, I interned at Rights Behind Bars, a prisoners' rights non-profit based in Washington, D.C. The organization represents incarcerated people on appeal. Many of the cases that Rights Behind Bars litigates involve claims seeking damages under Title II of the Americans with Disabilities Act. My manager was concerned that state sovereign immunity would prevent incarcerated plaintiffs from recovering monetary damages. As such, he asked me to research this question: Does Title II as applied to incarceration validly abrogate sovereign immunity?

I wrote this memo to answer that question, and have continued to revise it since. All research, writing, and editing in this writing sample are entirely my own, although I discussed some background concepts with my manager while writing this memo.

Justin Hill
Writing Sample No. 2

Introduction

This memo seeks to answer whether Title II as applied to incarceration validly abrogated state sovereign immunity. Part I discusses the test that courts use to answer this question, Part II explains how this test has been applied in the lower courts in a variety of circumstances, and Part III provides the best argument in support of Title II abrogating sovereign immunity in the incarceration context.

1. The *Boerne* Framework Determines Whether Legislation Passed Using Congress's Powers Under § 5 of the Fourteenth Amendment is Valid.

In 1990, Congress passed the Americans with Disabilities Act (ADA). The statute intended to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[1] To accomplish its anti-discriminatory purpose, Congress sought to hold states financially accountable for statutory violations by abrogating state sovereign immunity.[2] But this remedial scheme conflicted with the Eleventh Amendment and principles of federalism. Although the meaning of the Eleventh Amendment has been hotly debated for decades, modern Supreme Court precedent has interpreted it as a "jurisdictional bar" against diversity and federal-question jurisdiction, meaning that federal courts cannot hear cases in which state governments are being sued for monetary damages.[3]

The Supreme Court has held that Congress can abrogate Eleventh Amendment immunity if it "unequivocally expresses its intent" to do so and if Congress acts "pursuant to a valid exercise of power."[4] The ADA easily satisfies the first step of the two-part test; by declaring that "[a] State shall not be immune under the Eleventh Amendment to the Constitution," Congress unequivocally expressed its intent to abrogate sovereign immunity.[5] The second step—whether the legislation was passed through a valid exercise of power—remains an open question with regards to the incarceration context.

Because the Eleventh Amendment is grounded in principles of federalism and state sovereignty, the answer to the second question revolves around Congress's ability to regulate state actions. Article I powers, the Supreme Court has stated, do not provide sufficient authority to abrogate state sovereign immunity.[6] State sovereignty survived the ratification of the Constitution and Article I reflects the balance of powers that was struck at the time of ratification; therefore, Article I cannot grant Congress the power to override state sovereignty.[7] The adoption of the Fourteenth Amendment, however, expanded federal power at the expense of state sovereignty.[8]

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[1] 42 U.S.C. § 12101(b)(1).
[2] 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter.").
[3] *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73 (1996).
[4] *Id.* at 55 (1996) (cleaned up).
[5] *See supra* note 2.
[6] *Alden v. Maine*, 527 U.S. 706, 754 (1999); *but see Cent. Virginia Cmty. Coll. V. Katz*, 546 U.S. 356 (2006) (holding that Congress can abrogate sovereign immunity under the Bankruptcy Clause); *PennEast Pipeline, LLC v. New Jersey*, 141 S. Ct. 2244 (2021).
[7] *See Alden*, 527 U.S. at 741; *see also Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 30-35 (1989) (Scalia, J., concurring).
[8] *Seminole Tribe*, 517 U.S. at 65-66; *Alden* at 756.

Congress's ability to enforce the substantive provisions of the Fourteenth Amendment provides the authority needed to validly abrogates sovereign immunity.[9] Congress invoked "the sweep of congressional authority" in passing the ADA, including its powers under § 5 of the Fourteenth Amendment,[10] so the question of whether the ADA validly abrogated sovereign immunity or not depends on whether the ADA was valid § 5 legislation.

The Supreme Court's test for assessing the validity of § 5 legislation has changed significantly since the Fourteenth Amendment was ratified in 1868. In the first cases interpreting Congress's powers under § 5 of the Fourteenth Amendment, the Supreme Court stated that Congress had the authority to pass legislation that was "necessary and proper" to enforce the amendment's substantive provisions.[11] Eighty years later, in *Katzenbach v. Morgan*, the Court described Congress's legislative powers under § 5 by invoking Chief Justice Marshall's classic formulation: "Let the end be legitimate . . . and all means which are appropriate . . . are constitutional."[12]

In *City of Boerne v. Flores*, decided in 1997, the Supreme Court set the wheels in motion to adopt a more exacting means-ends standard. *Boerne* centered on the constitutionality of the Religious Freedom Restoration Act (RFRA), which was enacted "in direct response" to the Court's holding in *Emp. Div., Dep't of Human Resources of Oregon v. Smith* that the First Amendment's Free Exercise Clause provides no exemption from neutral laws of general applicability.[13] Congress attempted to override *Smith*'s holding by legislatively imposing a balancing test that would prohibit governments from "substantially burdening" a person's religious exercise, unless the government could demonstrate the burden furthered a compelling government interest through the least restrictive means.[14] The Supreme Court invalidated RFRA as it applied to the states because, by overriding the Court's interpretation of the Free Exercise Clause, Congress exceeded its authority under § 5 of the Fourteenth Amendment.[15] The Court emphasized that § 5 gave Congress the power to "enforce" the Amendment's substantive provisions in a remedial manner but did not permit Congress to define the substantive rights.[16] The difference, the Court noted, is not always easy to discern.[17] To help guide lower courts in making the distinction, the Court sketched the outlines of a three-part test that would be crystallized in subsequent cases.

The first step of the *Boerne* test instructs courts to identify the Fourteenth Amendment rights that Congress sought to enforce by enacting the statute at issue.[18] The Court may identify the rights implicated by a statute as a whole, as the Court did in *Kimel v. Florida Bd. of Regents* by finding that the entirety of the Age Discrimination in Employment Act implicated age

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[9] *Nevada Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 727 (2003).
[10] 42 U.S.C. § 12101(b)(4).
[11] *See* Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 Stan. L. Rev. 1127, 1141-42 (2001) (referencing *Ex parte Virginia*, 100 U.S. 339 (1879) and *The Civil Rights Cases*, 109 U.S. 3 (1883)).
[12] 384 U.S. 641, 650 (1966) (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819).
[13] 521 U.S. 507, 512-13 (1997) (citing to *Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872 (1990)).
[14] *Id.* at 515-16.
[15] *Id.* at 536.
[16] *Id.* at 519-20.
[17] *Id.* at 519-20 ("While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed.").
[18] *Tennessee v. Lane*, 541 U.S. 509, 522 (2004); *see also Boerne*, 521 U.S. at 529.

discrimination.[19] Or the Court may splice a statute into individual provisions. In *Nevada Dep't of Human Resources v. Hibbs*, the Court found that one subparagraph in the Family and Medical Leave Act aimed to protect the right to be free from gender-based discrimination in the workplace,[20] but found the following subparagraph to implicate only discrimination on the basis of illness in *Coleman v. Court of Appeals of Maryland*.[21]

Second, *Boerne* instructs courts to determine whether Congress enacted the legislation in response to a pattern of state-sponsored constitutional violations.[22] The history of unconstitutional conduct may be documented in case law,[23] previous legislation,[24] or the statute's legislative record.[25] The robustness of the pattern that can be identified at this step is largely determined by the level of scrutiny involved. If the statute implicates rights subject only to rational basis review, courts generally evaluate the instances of alleged discrimination with greater skepticism. In some cases, the Supreme Court has even supplied a rational basis that could make the conduct constitutional.[26] But if heightened scrutiny is involved, the deference flips—courts tend to find examples of discrimination to be unconstitutional because the state government would face a higher burden to justify their actions.[27] It is therefore "easier for Congress to show a pattern of

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[19] 528 U.S. 62, 83 (2000).
[20] 538 U.S. 721, 728 (2003).
[21] 566 U.S. 30, 38 (2012).
[22] *Lane*, 541 U.S. at 523-24; *see also Boerne*, 521 U.S. at 530-32. Some lower courts have stated that *Tennessee v. Lane* "satisfied" Step Two of the *Boerne* test for all applications. *See, e.g.*, *Miller v. King*, 384 F.3d 1248, 1270-71 (11th Cir. 2004), *vacated*, 449 F.3d 1149 (4th Cir. 2006) ("The Supreme Court in *Lane* concluded that Title II of the ADA was enacted in response to a history and pattern of constitutional violations by the States, thereby satisfying *Boerne*'s step-two inquiry."). But this is an improper characterization. The extent of the pattern identified at this step determines the size of the remedy that could be deemed congruent and proportional in Step Three, but a weak pattern identified at Step 2 cannot itself doom a case. *See Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 646 (1999) ("Though the lack of the support in the legislative record is not determinative, identifying the targeted constitutional wrong or evil is still a critical part of our § 5 calculus because strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.") (cleaned up).
[23] *Lane*, 541 U.S. at 524-25 (citing cases that "document a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities"); *Hibbs*, 538 U.S. at 729 (citing Supreme Court cases that "chronicle[]" the history of state laws limiting women's employment opportunities).
[24] *Lane*, 541 U.S. at 531 ("This pattern of disability discrimination persisted despite several federal and state legislative efforts to address it."); *Hibbs*, 538 U.S. at 729-30 (noting that Congress enacted Title VII of the Civil Rights Act in response to the history of sex discrimination, but also noting that "state gender discrimination did not cease").
[25] *Lane*, 541 U.S. at 527; *Hibbs*, 538 U.S. at 730-32.
[26] *Lane*, 541 U.S. at 547 (Rehnquist, C.J., dissenting) ("But financial considerations almost always furnish a rational basis for a State to decline to make those alterations."); *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 367-68 (2001) ("[States] could quite hardheadedly—and perhaps hardheartedly—hold to job-qualification requirements which do not make allowance for the disabled.").
[27] This is apparent by comparing *Bd. of Trustees of Univ. of Alabama v. Garrett* and *Tennessee v. Lane*, two cases involving the ADA's attempt to abrogate sovereign immunity. In *Garrett*, the Court considered Title I of the ADA, which prohibited disability discrimination in employment. In dissent, Justice Breyer compiled a list of 300 examples of employment discrimination by state officials. But the majority opinion dismissed Justice Breyer's list by saying that "adverse, disparate treatment often does not amount to a constitutional violation where rational-basis scrutiny applies." *Garrett*, 531 U.S. at 370. However, in *Lane*, heightened scrutiny was involved because the Court was considering Title II as applied to the fundamental right of